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THESIS

THE IMPACT OF THE COMPETITION IN
CONTRACTING ACT OF 1984 ON THE
CONTRACT AWARD PROTEST PROCESS

by

Michael J. Walsh

June 1987

Thesis Advisor:

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The Impact of the Competition in Contracting Act of 1984
on the Contract Award Protest Process

by

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Submitted in partial fulfillment of the
requirements for the degree of

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June 1987

ABSTRACT

The observed effects of the Competition in Contracting Act of 1984 have been: a marginally increased number of protests; dramatically improved decision times due to shortened agency response deadlines and GAO dismissal of spurious protests; and stays of award and termination of contract performance. There is no evidence that the increase in protests is related to increased complaints about restrictive sole source contracting. The legislative impact has been minimal at the field activity level where there is a widespread perception that protests are increasing for unjustified reasons. While personal experience may not support this complaint, it has a legal merit since the burden of proof has shifted entirely to the Government. Unintended results of the statute may include: 1) improved solicitation review to avoid situations vulnerable to protest, and 2) added scrutiny, with concomitant delay, in the source selection process to assess the defensibility of the tentative source selection decision.

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I. INTRODUCTION

A. BACKGROUND AND OVERVIEW OF ISSUES

Among its various provisions, the Competition in Contracting Act (CICA) of 1984¹ Public Law (P.L.) 98-369 amended the Federal statute regarding contract award protests, ostensibly for the purpose of increased competition. Sufficient time has passed since enactment to permit a preliminary assessment of the anticipated and unanticipated impacts of the legislation. This research concerned identification of the process related to award protests; an assessment of how that process was altered by CICA; and identification and analysis of trends relating to contract award protest that can be linked to CICA. Such trends were presumed to be indicators of the effectiveness of the legislation.

The Comptroller General of the United States asserted authority over bid protests² as a result of expansive interpretations of the Budget and Accounting Act of 1921 [1:113]. Under his guidance, the General Accounting Office (GAO) began to hear protests and established an institutional structure to accommodate the function. At

¹Alternatively referred to as the Act.

²See Section F for a discussion of terminology award protest and bid protest.

that time, it was the only recourse--administrative or judicial--available for protests, ignoring a disused nineteenth century practice of special Congressional relief legislation. Over the next forty years, the award protest system grew to include a judicial process as well as the GAO administrative remedy.

In 1968, the Senate Select Committee on Small Business found that "present procedures for handling (award) protests are entirely inadequate and unsatisfactory [2:38]." The 1972 Commission on Government Procurement (COGP) similarly concluded that the GAO bid protest procedures needed ". . . improvement in the interest of greater fairness and effectiveness [2:95;3:7]." COGP also found significant dissatisfaction with the bid protest system "in procurement literature, Congressional hearings," and its "study group hearings [4:167]." The longstanding limitation whereby GAO could only review and decide on the validity of contract awards weakened its procedures. The Comptroller General not only lacked authority to stop performance, or enjoin, the successful contractor during the period that the protest was decided, but also was unable to effect significant corrective actions. What this meant was that when a protester proved a valid case, the corrective actions available to GAO were prejudiced because significant contract execution had been accomplished by the time of the finding [2:97]. Finally, the contracting agency could

choose to ignore the GAO recommendations. These limits were exacerbated by an open-ended time scale for protests that further muddled the process. An increasing number of bid protests threatened "to destroy the value of the award protest system by turning it into a device that potentially could impede the overall efficient functioning of the procurement process [3:97]."

Over a period of years, sufficient dissatisfaction accumulated to compel legislative change. Criticism appeared in literature published about Government acquisition, as was summarized in the comprehensive 1972 Report of the Commission on Government Procurement [2,3,4]. A compromise set of recommendations taken from several sources eventually became part of the CICA, although intervening factors influenced the manner in which these recommendations were implemented.

In a sweeping reform of Government procurement, CICA focused on restoring competitive contracting to preeminence. Among the methods employed in CICA to effect the desired reversal from directed to competitive procurement were provisions that formally empowered GAO to hear protests and directed GAO to reformat its bid protest process. Thus, CICA attempted to enhance the GAO bid protest process not only to correct prior weakness but to aid in fundamental restoration of greater competition to Government procurement [5:5]. Now, if a competitive bidder has been wronged, he

presumably has the means to press his case and to have a reasonable and fair opportunity for administrative remedy.

B. PROBLEM STATEMENT

The general area of concern was an assessment of how award protests relate to the integrated whole of Government acquisition policy. Since award protest resolution power resided institutionally with the GAO and procedures were formally published for protester's use, there existed, de facto, a GAO bid protest process. The specific problem was, then, to determine the actual impact of CICA on the GAO bid protest process by comparing the process before and after enactment.

The first element of the problem was to define, in general, the award protest system and, in specific, the bid GAO protest process both before and after CICA.

The second element was to determine the actual CICA changes regarding the process and their underlying intent. This was considered important since the intent of the Congress is seldom perfectly translated into the language of the legislation and agencies have not always interpreted matters precisely as the Congress wished.

The third element of the problem was to locate and quantify any observable functional measures of the bid protest process. Such process measures provided a basis for the comparison of trends before and after the Act. An

attempt was made to impute reasons for the trends and to establish, by deduction, underlying causes.

C. OBJECTIVES OF RESEARCH

By virtue of timing, this study took an early, yet comprehensive look at the results of CICA bid protest reform from a perspective of whether the legislation met its intended purpose. Based on answers to specific research questions regarding the nature of the process and how it functioned before and after CICA, it was possible to assess whether, as intended, CICA corrected any supposed, pre-existing problems of the award process system. To the extent that the research objectives were met, the analysis provided an indication of the effectiveness of the award protest aspects of the CICA.

It was also possible to determine whether other, unforeseen problems have resulted in consequence to the statutory changes. Unintended consequences found were suggested as the basis for further analysis and recommendations.

Finally, to the extent that the study analyzed the effectiveness of the bid protest system, it was possible to draw normative conclusions regarding the role of the protest system in general government acquisition policy.

D. RESEARCH QUESTIONS

The primary research question of the thesis was: What has been the impact of the Competition in Contracting Act of 1984 on the bid protest process?

While additional subsidiary questions arose during the research, specific questions were apparent at the outset, including the following:

1. What precipitated the changes found in the CICA?
2. What were the primary objectives that could be found in CICA regarding the bid protest process and had they been achieved?
3. What was the new bid protest process and to what extent did it actually change from pre-CICA procedures?
4. What were the principal management control standards of the bid protest process and what changes did these measures reflect?
5. To what extent were the new stay and termination provisions being exercised?
6. Was the behavior of the principal entities involved in the process changed as a consequence of CICA?
7. Have there been any unintended consequences of the CICA bid protest modifications?

E. SCOPE, LIMITATIONS AND ASSUMPTIONS

1. Scope

The scope of this thesis was a comprehensive examination of the GAO bid protest process, an element of an overall award protest system, with an objective of determining how that process operates before and after enactment of the Competition in Contracting Act of 1984.

The research focused initially on the broad range of GAO bid protest activities.

Contracting field activity data and perceptions provided a relevant second avenue to evaluate the bid protest process from a perspective other than that of the adjudicator, GAO. Because the scope of contracting agency perspective was so broad, this aspect of the study was restricted to the experiences of the Naval Supply Systems Command (NAVSUP) as one Navy acquisition agency quite likely to encounter a full range of contract values, contract types, and contracting methods. These broad range dealings qualified as a first approximation to relevant experience in lieu of statistically significant sampling analysis. Five NAVSUP field activities were selected: the two Inventory Control Points (ICPs) and three continental United States Navy Regional Contracting Centers (NRCCs). These activities were selected because of the volume of their transactions and the range of their activities, in addition to the fact that all were readily accessible and supportive.

Research regarding historical matters was principally literature based, although supplemental interviews were used when possible. Because these matters are current, unpublished data and personal opinions were crucial. These were sought by telephonic interview.

One of the provisions of CICA established a special category for bid protests relating to automated data

processing (ADP) procurement. All ADP protests fall under the jurisdiction of the General Services Administration (GSA) Board of Contract Appeals. In that such protests are special situations beyond the norm of routine Government acquisition and notwithstanding ongoing controversy regarding this provision, ADP protests were not considered in this thesis.

2. Limitations

The research matters were bounded fundamentally by the element of time. CICA bid protest provisions became effective 15 January 1985, so only slightly more than two years had elapsed. Therefore, the post-CICA case data base was finite, although large. Furthermore, data compilation and publication lead times were nearly six months, so they constrained the available data; for example, few fiscal year (FY) 87 GAO cases had been published at the time of writing.

Given these constraints, this aspect of the research focused on the time period FY 80 to FY 86 plus FY 87 as data were available. This provided one partial and four full years of pre-CICA experience and one full and two partial years of post-CICA experience. Where data for additional prior years were readily available, they were gathered as well and proved useful in analysis of performance statistics.

A second limitation was the volume of GAO case data. The sheer number of cases prohibited a complete review

within the scope of this effort. The research therefore was limited to Department of the Navy experience, although contrasting data was used when readily available to establish how the Navy experience generally correlated with other Department of Defense (DOD) and civilian Government agencies. To the extent that sustained outcomes could be identified, they were analyzed.

A third limitation arose as a result of implementation controversy. For reasons that will be discussed later, the contracting agencies did not fully comply with the contract stay provisions of CICA until several months after actual enactment. This affected data availability regarding stays and terminations in a limited fashion.

3. Assumptions

Two unstated assumptions of the CICA merit general introductory comment. CICA assumed: 1) that a relatively large body of dissatisfied bidders seeking recourse existed as a result of flawed, pre-CICA Government regulations, and 2) that the changes contained in CICA would meet resistance by the contracting agencies. These assumptions were credible especially if one inferred either a bureaucratic reticence to change or an outright unwillingness to use competitive procurement techniques on the part of Government procurement agencies. The two assumptions led one to infer that the flawed, pre-CICA protest process suppressed some

number of protests. Thus, if the CICA provisions affecting the protest process made protesting easier and the probability of gaining satisfaction greater, dissatisfied bidders would have been protesting more and distinct changes should have been observable in the number of cases submitted, the number heard, and quite likely, the number sustained.

F. DEFINITIONS

- Award Protest/ Bid Protest--Although the Federal Acquisition Regulation (FAR) used the term award protest exclusively, the term bid protest was often used interchangeably in the literature. COGP noted that bid protest was historically used, but that award protest more accurately included the negotiated procurement method which was more prevalent than the sealed bid method [2:5]. Notwithstanding the subtle distinction, the CICA language referred only to bid protests. Both terms were used throughout the text without distinction, unless specifically noted.
- Protest--Protest was used to mean a written objection by an interested party to a solicitation by an agency for offers for a proposed contract for the acquisition of supplies or services or a written objection by an interested party to a proposed award or award of such a contract [6:33-1].
- Interested Party--An interested party was an actual or prospective offeror whose direct economic interest would have been affected by the award of, or failure to award a particular contract [6:33-1].

G. ORGANIZATION OF THE STUDY

Chapter II details the study methodology, including a discussion of relevant data sources.

Chapter III provides background and a theoretical basis for understanding the award protest system and the GAO bid

protest process. It addresses how the bid protest process worked prior to CICA, the alterations directed by the Act-- both actual and desired, and the modified protest process that results.

Chapter IV addresses research data and analysis regarding the GAO bid protest process. It comprises both GAO measures of bid protest process performance and some agency specific information.

Chapter V presents the data and personnel opinions of bid protest activity at the field activity level plus analysis and interpretation.

Study results, conclusions, and recommendations are contained in the final section, Chapter VI.

II. METHODOLOGY

A. INTRODUCTION

The methods used herein are: 1) literature review, 2) data collection and analysis, and 3) selective personal interviews. Source material included published materials; published and unpublished GAO information; internal, unpublished Navy data; interviews with GAO attorneys and Navy field activity personnel; and Comptroller General decisions.

Some of the research questions posed in Chapter I were answered as a result of the literature search. Responses to the remaining questions required specific data collection. Data collection methods are described in this chapter. Actual data and analyses are reserved for presentation in Chapters IV and V. Interviews supplemented both the literature and the data throughout.

B. LITERATURE RESEARCH

Literature research began with preliminary bibliographic searches of the Defense Technical Information Center (DTIC), the Defense Logistics Studies Information Exchange (DLSIE), and the Naval Postgraduate School (NPS) Library. These bibliographic searches indicated that publication of primary data and analytical materials was spotty, however, significantly more data was found in secondary sources such

as the Federal Contract Report (FCR) which provided synopses of GAO decisions and GAO summary performance statistics [7].

The literature offered a solid foundation for the studies. The Federal Register and regulations published in the Code of Federal Regulations (CFR) provided the basis for comparative analysis of GAO bid protest procedures before and after the Act. Sufficient summary sources were available to permit analysis of the pre-CICA situation and to adequately document Congressional intent. Good statistical data also existed concerning post-CICA GAO activity. Finally, there were several published analyses written from a legal point of view that suggested further reforms were needed.

Results of the literature search established the background and theoretical framework presented in the next Chapter. Where the published analysis of post-CICA activity was very limited, telephone interviews provided invaluable supplemental information.

C. DATA COLLECTION

1. Introduction

Data collection efforts drew upon the literature research but encompassed original work as well. Collected data are reported by functional categories: bid protest process measures; contract stays and terminations; and agency personnel perceptions. Within each category, data are subcategorized by data source.

It has proven useful to deal with the bid protest process using an elementary systems engineering framework: inputs, process (with feedback), and outputs. Such a framework provided a reference structure which: 1) helped organize the numerous measures of bid protest process functions, and 2) could be superimposed readily on the functional category/ data source subcategory structure without disrupting it.

2. GAO Performance Data

Granted the assumption that bid protests were resolved in a more or less formal process, then some set of functional process measures--either formal or informal--already existed. It followed logically that the starting point was the GAO measures of its own activity.

Since at least the late 1960's, GAO has made available summary statistics of its bid protest activity after the close of each fiscal year [7:514:C-1¹]. Only macroscopic measures were released in the early years. However, by 1974 a resume framework illustrating data for the five most recent years had been developed [7:455:A-16]. It was used consistently until CICA enactment [7:734,7:775,7:818,7:864,7:910,7:39,7:41,7:43]. For illustration purposes, a composite of the resumes which

¹Subsequent references to the Federal Contracts Report cite reference number: volume number: page citation, e.g., Reference #7, Volume 514, page C-1.

appeared during the time period of interest is provided in Table 1.

Over the period 1974 to 1984, an increasing amount of supplemental data were also provided with each passing year. By the time CICA became effective, supplemental data filled the greater portion of five pages [7:45:339-341]. Prior to CICA, GAO did not formally publish these data as stand-alone matters of record either in the Federal Register or as a numbered report to Congress, as were most GAO reports [8]. But they were included in the Annual Report of the Comptroller General of the United States [2:40].

With the enactment of CICA, GAO began to publish the data as a numbered GAO report [9,10]. CICA required only that GAO provide Congress:

not later than January 31 of each year . . . a report describing each instance of an agency failure to comply with the Comptroller General recommendations during the preceding fiscal year {31 U.S.C.3554(e)(2)} [9:1].

In both reports submitted in fulfillment of this mandate, GAO has appended such summary statistics [9,10]. The FY 85 report rendered a dual accounting of pre-CICA and post-CICA statistics that was somewhat lengthy and complex, but the statistics were readily traceable to the format of the pre-CICA supplemental data [9].

The FY 86 report proved equally lengthy [10]. The data contained in the post-CICA reports differed somewhat from each other as well as from the pre-CICA data. A GAO attorney indicated that the changes reflected an attempt to

BID PROTEST REPORTS RESUME STATISTICS

	Fiscal Year										
	1974	1975	1976*	1977	1978	1979	1980	1981	1982	1983	1984
Protests Denied	534	493	887	723	507	387	356	391	451	565	502
Protests Sustained	44	46	91	97	63	67	61	90	83	62	70
Protests Dismissed	--	--	15**	151	307	275	277	296	439	476	469
Advertised Procurements	353	283	631	469	567	428	411	504	702	795	671
Negotiated Procurements	225	256	347	351	327	333	366	392	389	446	445
Protests Received and Decided Before Award	240	178	356	350	261	285	288	283	406	517	382
Protests Received and Decided After Award	338	278	468	358	601	405	409	496	555	597	585
Protests Received Before Award and Decided After Award	87	83	154	104	32	71	74	117	130	127	157
Corrective Action Recommended	44	91	148	115	23	75	59	68	70	52	53
Corrective Action Recommended Under P.L. 91-510	14	7	22	35	54	6	10	9	16	17	17
Reconsiderations	45	49	92	84	87	91	89	94	133	112	121
Contract Cancellation/Termination Recommended	12	24	18	15	3	3	6	10	10	14	18
Protests Where Decisions Rendered	578	539	978	820	894	857	876	1007	1091	1377	1261
Withdrawals Before Decision	320	327	507	435	425	391	462	506	588	593	607
Miscellaneous	161	106	285	258	237	215	313	375	462	455	378
Total Protests Closed During FY	1059	1093	1785	1664	1556	1463	1651	1888	2359	2425	2146
Total Protests Received During FY	979	1070	1737	1607	1445	1577	1612	1899	2462	2639	2071
Review of Awards Under Grants	--	--	--	16**	35	23	27	27	30	21	16
Review of Grants & Cooperative Agreements	--	--	--	--	--	2	1	--	2	3	--

*/ includes 3 month transition period; **/Started Dismissal and Review of Grant Complaints

Source: Compiled by Researcher, Ref. 7.

develop measures that would be easily understood by the Congress. Unsatisfactory experiences in Congressional appearances motivated the effort; similar changes are a good possibility in the future [11].

GAO implied that its chosen statistics had merit in assessing bid protest process performance. This assertion was made in GAO's fiscal year (FY) 86 report which asserted the "responsibility" to create "an efficient bid protest process" as justification for the submission of the annual summary statistical evidence to Congress [10:4]. It would make little sense if GAO submitted irrelevant or inappropriate data to the Congress.

3. Secondary Publication of GAO Data

Trade newsletters such as Federal Contracts Report and Government Contracts Service abstract and publish the GAO data shortly after release [7,12]. These synopses were readily available in libraries; consequently this researcher relied on these secondary sources. Random cross checks between the newsletters and GAO reports were made to assure fidelity.

4. Navy Field Activity Data

Additional data was sought from Department of the Navy contracting activities by informal liaison. These activities were the primary source of information regarding unintended consequences and stay or injunction actions.

Again, access to key personnel proved to be a valuable source.

The bid protest statistics were obtained with mixed results. The staff of the Assistant Secretary of the Navy, Shipbuilding and Logistics (ASN,S&L) was involved in receiving limited data from the various Systems Commands as part of a short term, post-CICA monitoring effort [13]. The submissions were terse summary documents called "after action" reports that summarized GAO case dispositions, including estimated processing cost to the agency. Little, if any analysis of these data was being performed by either the submitting activities or ASN,S&L and no management decisions were based on the data. Neither were the data consolidated to verify GAO statistics. Similar data did not exist for activity prior to CICA. ASN,S&L was able to provide only limited summary data for NAVSUP activity for one calendar year, 1986. [13]

Two Systems Commands--the Naval Air Systems Command (NAVAIR) and the Naval Supply Systems Command (NAVSUP) were unable to provide better data, and NAVSUP could not conveniently access the same data it provided to ASN,S&L [13,14]. Within NAVAIR and NAVSUP the burden of preparing after action reports fell to the field activity legal staffs [14,16,17]. Contracting staff participation in data collection, if present, was minimal [16]. The after action reports were prepared as a closeout task, submitted to

ASN,S&L via the Headquarters staff and promptly forgotten. They apparently remained in the record only by specific case and were not the basis for management control or information.

At the ICP and NRCC level, cooperative individuals were able to resurrect selective aspects of the bid protest process statistics. Field activities withdrew some data from the Procurement Management Reporting System (PMRS) operated by the Naval Data Automation Command (NAVDAC) for NAVSUP. These data were based on DD Form 350 contract data and had limited usefulness to the study [18]. Protest information was not included in the Federal Procurement Data System (FPDS) operated by the Office of Federal Procurement Policy (OFPP) [19:Encl.1].

Generally there was no formalized data base or tracking system required and bid protest data apparently were not used routinely to manage activity contracting performance. For those few activities that did compile data, they reviewed it in passing and the organizations were otherwise not concerned unless specific, alarming material was noted [18]. Supervisors did not routinely manage to bid protest process statistics [20].

5. Alternate Sources

This researcher found no other major data sources for GAO performance measures. GAO answered only to the Congress and Congress had imposed no reporting requirements.

There appeared to be no independent "watchdog" organizations that monitored GAO performance. Furthermore, the contracting literature was largely mute regarding award protest statistics beyond the newsletters mentioned above.

D. CASE DATA

Review and analysis of GAO findings provided a fertile ground to explore the explicit and implicit rationale and justifications for decisions. Decisions of the Comptroller General were reported by Federal Legal Information Through Electronics (FLITE), which is "an automated legal research system established by the Department of Defense and operated by the U.S. Air Force use by all federal agencies [21]." GAO customarily titles decisions either published or unpublished. The technical distinction is a moot point since both types appeared in the FLITE data.

The FLITE data base provided access to the published and unpublished decisions of the Comptroller General which were included up to approximately April 1985, which formed the bulk of case data used. Via FLITE, access was also gained to LEXIS*R for more recent decisions of the Comptroller General spanning the period April 1985 to approximately March 1987.

E. INTERVIEW METHODOLOGY

1. Introduction

As noted above in the discussions of bibliographic research and data collection, telephone interviews were essential to the research.

A second, distinct use of telephone interviews was to assess field activity personnel awareness and attitudes regarding the bid protest process. This section addresses the methods used to interview these individuals.

The perceptions of Navy field activity personnel were sought for several purposes. First, contracting officers in the field operated daily at the point of entry for bid protests, consequently their attitudes and perceptions were highly relevant. Second, the contracting officers were at the end of the chain of events that began with enactment of legislation. By contrasting the field activity perceived changes to the Congressionally intended changes, the dilution occurring in the distribution process could be assessed. Third and finally, the first-hand users of the law had the best view of unintended consequences. By going directly to these people, the communication errors which could occur when a message is sent back from the field organization could be avoided.

2. Technique

The purposes of these telephone interviews was to sample the opinions of field activity personnel and to

elicit information regarding the legislative impact of CICA. The scope of the survey was limited and it was not intended to be a statistically significant analysis.

Relevant questions were determined based on bibliographic research and preliminary data collection efforts. The questions were selected as a range of topics to be addressed in the course of each ongoing discussion.

Appendix A presents the raw form interview checklist used by the researcher as a guide during each interview. The heading information related to organization, position, and commodity area and the first question were intended to disclose the experience level of the individual. Special attention was paid to determining whether the individual was involved in contracting at the time the law changed. Question 2 was intended to provide an assessment of the working knowledge of the individual interviewed regarding protest procedures. Questions 3 through 11 focus on how protests were handled and contracting officer attitudes about protests within each organization. Care was taken that the interviewer not introduce CICA at this point. However, if the respondent began to talk about the matter, it was pursued freely. Questions 12-15 then addressed the awareness and knowledge of the individual about the CICA changes and his or her opinions were solicited.

The telephone checklist was tested in three face-to-face interviews of students at the Naval

Postgraduate School who had prior experience in field activity procurement. The test proved that the questions were not unreasonable and seemed likely to work in a telephone environment.

The scope of the interviews included five interviews at each ICP and three interviews at each NRCC, for a total of 19. The individuals interviewed were chosen with the assistance of highly-placed military or civilian contacts. Experienced contracting officers were sought.

III. BACKGROUND AND THEORETICAL FRAMEWORK

A. INTRODUCTION

1. Overview

Disputes can occur in the process leading to award of a Government contract. Typically disputes arise from matters such as allegations that a technical evaluation was improperly conducted, the type solicitation was improper according to agency rules or regulations, the low bidder was not qualified, or the bidder awarded the contract was not responsive to the terms of the solicitation. [2:5]

Certain administrative and judicial actions are available in the event of such a dispute. The collection of alternative actions available to a dissatisfied bidder comprise what can be called, for want of a better term, an award protest system.

One event seems central in the literature regarding the award protest system--the work of the Commission on Government Procurement (COGP). The Commission was created in 1969 to conduct a major, comprehensive investigation of the Government procurement process with a view towards improving the management of Federal procurement [1:3,100]. The ensuing study spanned more than two years. By virtue of its timing and comprehensive nature, COGP provided a convenient and efficient framework from which to discuss the

award protest system. The achievements of COGP are sufficiently definitive to establish a good baseline.

In a February 1972 Final Report, COGP Study Group #4 (Remedies) clearly described "the entire federal procurement picture" relating to contract remedies [4:1]:

From its inception, the law of public contracts has been cast in the mold of specialty. Under the impact of the twentieth century with its capacity to exhaust resources and the surge of modern technology creating new needs while satisfying old wants, there rapidly developed mounting controversy surrounding the rights and duties of individual private contractors and their customer, the United States.

Remedies had to be designed and implemented which would permit speedy, expeditious and skilled review and settlement of claims. The first impulse was for the head of the department responsible to attempt to settle the controversies on his own, quickly and finally, so as to avoid the long course of litigation resulting from formal suit. This procedure was quickly modified at the beginning of World War I. The exigencies of massive wartime procurement in that period with the corresponding increase in disputes initiated the modern era of public contract law. The department head could no longer personally deal with every claim and the War Boards were created to review contractor claims expertly and expeditiously. An intricate system of administrative appeals and judicial review was thus beginning to evolve gradually. Expediency required one type of remedy one time and a different type another time, and consequently, the system has become complex, fragmented and redundant. A segment of industry believes that the remedial process as it currently exists is also excessively time-consuming and very expensive, especially with respect to small dollar value claims. This is paradoxical in view of the original intention to provide a system designed for speedy and inexpensive disposition of claims with a minimum of formality and judicial intervention. [4:4-5]

Several points in this lengthy quotation deserve to be emphasized by way of introducing the award protest system. First, award protests constitute one of two recognized classes of remedies; specifically, they are pre-

contract remedies "available to a contractor or prospective contractor in a protest against award [4:11]." This is in contrast to contractual remedies, often called disputes, that apply to disagreements between parties actually bound by contract. The Federal Acquisition Regulations (FAR) differentiate between protests and disputes in this same manner [6:33-1,3].

Second, the protest system which has evolved includes three forums: protests to the contracting agency, protests to the General Accounting Office (GAO), and judicial system protests.

Third, the working definition of bid protests-- "complaints lodged against the operations of the bidding or contract award process by interested parties in forums designed to receive those complaints"--indirectly addresses the question of who may protest [4:148]. The abbreviated discussion of the right to protest that follows is intended to identify and survey an issue area rather than to address the matter definitively. A complete discussion would require more extensive analysis of Federal court findings. For the purposes of this research, it is sufficient to recognize that the matter of entitlement has some measure of controversy; that the controversy is, at present, strongest in the judicial forum; and to know something of the scope of the issue.

2. The Right to Protest

The operant words, interested party, have a meaning intended to bound the legal entitlement of ". . . those who desire to enter into a contract with the Government. . . . [2:147]." As COGP noted:

Unlike disputes occurring under a contract, no clause in the solicitation gives the offeror a right to protest. Nor is such found in any statutory language. The basic executive procurement regulations and procedures promulgated by the General Accounting Office (GAO) permit protests against the award of a contract to be logged with the agency that solicited the award and with the GAO. Protests may also be filed with the U.S. district courts or Court of Claims¹. . . . [2:5]

In selecting the term "interested party," COGP avoided the fundamental question of who has standing to protest a contract award. Rather, they assumed the then-existing award system as a starting point. As COGP saw matters, the term "interested party" implied: 1) that protest rights accrue to parties that were not immediately apparent; and, 2) that such accrued rights differ slightly among the three forums.

Protests to the contracting agency were permissible for interested parties, which was defined conservatively to encompass ". . . an actual or prospective offeror whose direct economic interest would be affected by the award or failure to award a particular contract" [6:32-1]. Presumably, each agency was left to interpret who falls into the interested party category, yet, undoubtedly, agency

¹Former title. Now known as the U.S. Claims Court.

judgement must be biased by the regulatory dictate that each ". . . interested party . . . (is) encouraged to seek resolution within the agency before filing a protest with the GAO. . . . " [2:37]. Contracting officers can best meet the spirit of the FAR by liberal interpretation of interested party status, thus permitting more lower-level resolutions.

Likewise, protests to GAO are subject to an interested party rule, but as the term has been interpreted by decisions of the Comptroller General. GAO has broadly applied interested party ". . . to include contractors who have not submitted bids because the specifications are considered too restrictive, potential subcontractors at any tier, or even associations and labor unions" [4:157]. These less obvious outsiders of standing are sometimes called "third-parties" and their protests are termed "third party protests" [21].

The COGP study did not mention any criticisms resulting from appeals in which either the contracting agency or GAO took an excessively restrictive interpretation of the right to protest that unnecessarily disenfranchised a protestor. Consequently, it can be assumed that--at least at the time of COGP--protestors, as a group, had no significant quarrel with the interested party test.

The judicial forum does not rely on the interested party definition at all. Originally, a 1940 Supreme Court

ruling found that ". . . protestors have no right (standing) to have their protests heard in a court of law, because the Federal procurement statutes confer no judicially enforceable rights on offerors for Government contracts" [2:7]. Only in 1970 did Federal courts reverse the prior decision, thereby interpreting legal standing more broadly to permit protestors this opportunity. "In 1970 two decisions . . . squarely held that offerors have standing to challenge administrative action taken in the contract award process" [4:163].

At first reading, judicial interpretation of the protestor's rights seems narrower than the interested party test in that the courts refer to "disappointed bidders" and use as authority the Administrative Procedures Act {5 U.S.C.701 et seq}². This legal basis implies the bidder must have actually submitted a bid for which an ". . . administrative decision . . . " was ". . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" [23:10]. Thus, third parties and similarly distant interested parties who might achieve a hearing before the contracting officer or the GAO could be refused. However, COGP reported:

. . . certain United States Supreme Court decisions issued shortly after . . . have enabled the federal courts to find standing not only for offerors on Government contracts but also for others, such as labor unions and

²References to the statutes of the United States Code are cited as volume/U.S.C./part.

contractor associations, whose interests in Government contracts are "arguably within the zone of interest to be protected or regulated by the statute of constitutional guarantee in question." [4:162-164]

In its final Report, one COGP conclusion addresses the ". . . need to clarify authority for judicial review of contract award decisions," however, no corresponding recommendation was incorporated. (Although, COGP did emphasize that "the judicial review of award protests has value.") [3:99]

In sum, a dissatisfied protestor has limited rights to submit his case to any or all of the three forums. While a hierarchy is suggested to the protestor, it has not been established in an integrated and coherent fashion since concurrent efforts are possible and levels can be bypassed. Adherence to the hierarchy is favorable to the protestor in that each higher level requires a more cumbersome and presumably more costly submission. Slight variations in the definitions of rights might permit some protests in a given forum that might be disallowed in another, but, in general, the right to protest is limited to those with a demonstrable interest in the award.

In the balance of this chapter, we will identify and trace the evolution of the award protest system; review the alternatives available for protest; examine in detail the administrative process of protest to the GAO; and look at how the CICA altered the GAO process.

B. THE AWARD PROTEST SYSTEM

1. Overview

COGP identified and described an award protest system consisting of ". . . three principal forums where bid protests may be adjudicated: the contracting agency, the GAO, and the courts" [2:4-35,4:148]. Figure 1 depicts that process. The contracting agency and GAO alternatives are administrative, while the Federal courts option is judicial in nature.

COGP also provided a concise synopsis of the hierarchical workings of the three forums:

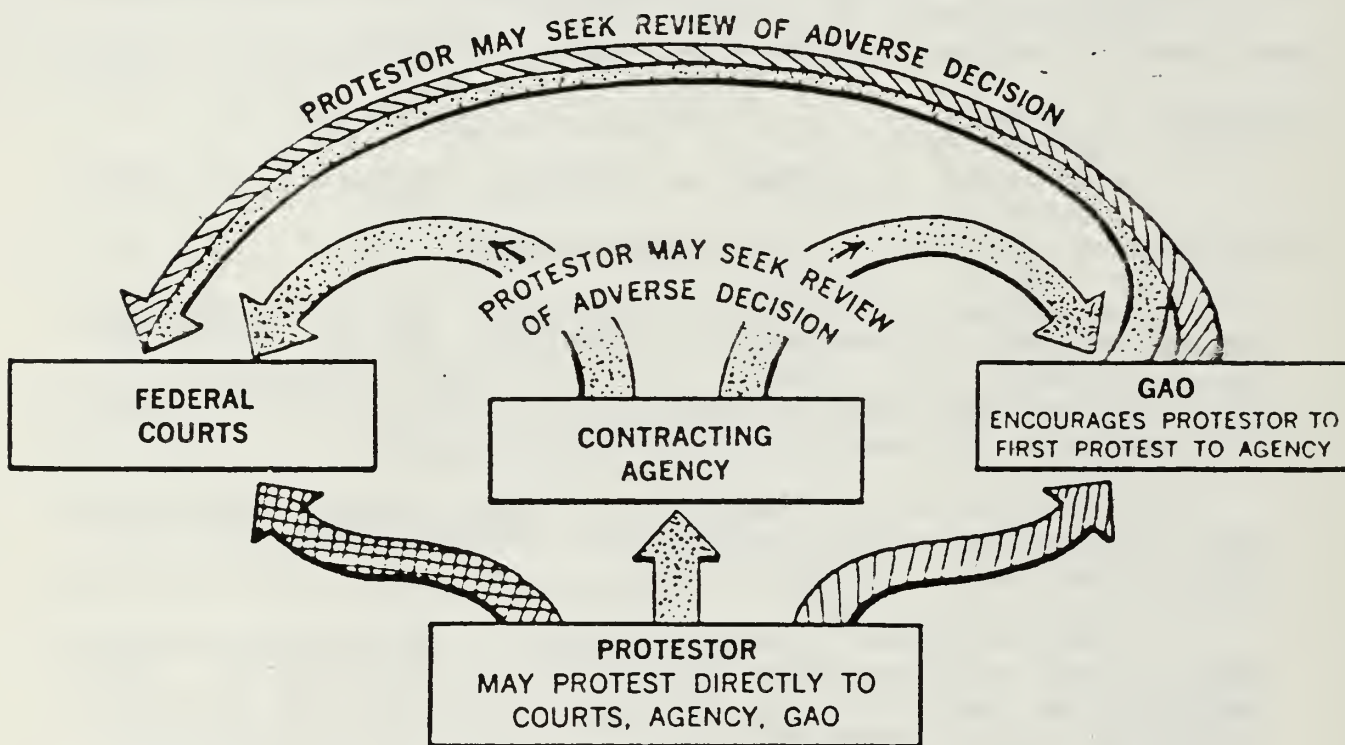
If a protestor initially lodges his protest with the procuring agency, and does not prevail, he may lodge the same protest with GAO. . . . If the protestor is dissatisfied with the GAO opinion, he may, in turn, lodge the identical protest with the federal courts.

If the protestor lodges his initial protest with GAO, then he may, if dissatisfied with the GAO decision, file the protest with a federal court.

If the protestor protests first to a federal court, then he may not lodge that protest in another forum. The contracting agencies and GAO are bound by the court's decision. The protestor's only recourse is to appeal an adverse decision through that court's particular appellate structure. [4:166-167]

We will examine each of the three forums in hierarchical, sequential order in the sections that follow, while adding special emphasis to the GAO forum because it is the focus of the research. The necessary framework includes a working knowledge of the total award protest system. Relevant portions of the history of bid protests pertain to

DISPUTES RELATED TO AWARD OF CONTRACTS
THE PRESENT REMEDIAL SYSTEM



Source: [3:6]

Figure 1. Disputes Related to Award of Contracts

understanding the underlying legislative intent of CICA; consequently, they are also included in the narrative.

2. Protest to the Contracting Agency

The primary alternative available to an interested party (as defined and discussed supra) is direct protest to the contracting agency. Such protests seek administrative resolution of an executive branch action. While Federal procurement regulations stipulate a right to protest to the contracting officer directly, they are silent regarding higher level appeals. The detailed working data compiled and published by COGP showed a wide range of practices and procedures among the various Federal agencies concerning how and by whom protests were resolved [24:A33-40]. COGP inferred from the data that the regulations allowed protests to higher authority within the contracting agency. COGP noted that resolution at the contracting officer level was, in fact, exceptional and higher level decision occurred more frequently [24:33].

Protest to the contracting agency is the preferred course of action. "GAO regulations, in fact, now urge the protestor first to seek resolution of its complaint with the procuring agency before it proceeds to GAO [2:37]." The reason for the preference is the simplicity and expediency offered at this level.

The FAR is conspicuously silent regarding grounds for protest as well as what constitutes a valid protest

submission. Procedures for protest to the agency are equally elusive. The FAR procedures as written concern guidance to Government contracting officers regarding what to do, but are conspicuously silent to would-be protestors on procedures about how to make a complaint. This bias existed at the time of COGP [4:155]. It remains unrectified at the present.

Regulations for both defense and civilian agencies require that contracting officers not only consider all protests, but also delay award until any protest is resolved, unless the contracting officer can determine that:

- 1) the supplies and services to be contracted for are urgently required; or
- 2) delivery or performance will be unduly delayed by failure to make award promptly; or
- 3) a prompt award will otherwise be advantageous to the Government. [2:5,4:156,6:33-1]

These same provisions exist in the Armed Services Procurement Regulations (ASPR) and the Federal Procurement Regulations (FPR) that were superceded by the FAR in April 1984 [4:154]. Furthermore, agency regulations required approval by an official above the contracting officer level for award in the face of a protest [4:166].

Resolution of protests by the procuring agency occurs administratively without formal hearings or procedures and is usually based on the written record [2:6,36;4:156]. These protests continue to be processed even when concurrent with a GAO protest. However, agency

action does stop when a judicial protest is filed. Final decisions must be issued to the protestor in writing [6:37-1].

If a protestor does not prevail in a protest to the procuring agency, he may lodge the same protest to the GAO [4:166]. Notably, there is no provision in procurement regulations for higher appeal of an unsuccessful protest to a "judicialized forum such as a board of contract appeals" [2:6]. However, it is interesting to note that ASPR and FPR suggested that the procuring agencies solicit the views of GAO "regarding the protest wherever such action is considered desirable" [4:157].

3. Protest to the GAO

a. Overview

The second forum in the award protest hierarchy is protest to the GAO. A dissatisfied bidder or offeror who has an interest (as discussed previously) in a Government contract may file a protest to the GAO ". . . provided the accounts of the agency . . . are subject to settlement by GAO. . . ." [2:6]. This limitation rarely applies. To reiterate a point made earlier, the protest can be filed subsequent to protest to the contracting officer or directly to the GAO without seeking a contracting officer determination, but protestors are urged to attempt resolution first with the contracting agency. Like contracting officer protests, GAO protests are

administrative matters. They differ in that they are legislative rather than executive branch actions.

Additional unique features of this forum are discussed in more detail in the following sections because of the importance of the GAO forum to the research topic.

b. Legal Basis of the GAO Bid Protest Process

GAO, itself, was established by the Budget and Accounting Act of 1921 [1:134]. The Comptroller General rendered the first GAO bid protest decision in 1925 [4:225]. At that time, GAO questioned its own jurisdiction but resolved the matter internally and the jurisdiction issue was not mentioned in the written decision [4:225]. As COGP noted:

GAO has construed its "settlement powers" as including the implied authority to decide bid protests. This theory rests upon an obligation, as part of its duty to audit and settle public accounts, to determine the legality of contract expenditures and assure compliance with the laws and regulations relating to expenditure of public funds. By deciding bid protests, therefore, GAO concludes that it is, in fact, preventing unauthorized payments by determining in advance the validity of a contract which obligates public funds. GAO acknowledges there is no specific provision of law which authorizes the Comptroller General to consider bid protests and that it became an adjudicatory forum "because a need for their type of review was recognized and there was no other agency to undertake jurisdiction in the area. [4:159-160]

Prior to CICA, no statute expressly authorized GAO to decide bid protests. Thus, the role of GAO as a bid protest adjudicator began and continues under a cloud of low level, yet persistent controversy. The matter of GAO legal authority to hear bid protests is a constitutional issue

concerning the separation of powers doctrine that has been argued continuously in legal forums since the earliest times of the United States. As will be discussed later, this specific argument caused delays in implementing CICA in 1985, but it is not presently a factor that materially affects how the GAO protest process functions. What is significant is the fact that GAO manifestly exercised this authority from 1925 through 1984 in the absence of specific statute, but with tacit and oft-repeated Congressional forbearance [25:10]. The volume of protests alone indicated that a need existed. No alternative organization met the need nor did any agency try to oppose the GAO initiative.

c. GAO Bid Protest Procedures

GAO bid protest procedures are published in the Code of Federal Regulations at 4 CFR Part 20, thus providing both actual and constructive notice to all would-be contractors and protestors. Agency regulations reference the GAO procedures. GAO procedures do not limit explicitly what may be protested. But, GAO restricts its own jurisdiction in several ways:

- 1) GAO will not consider protest matters that involve Small Business Administration (SBA) determinations of "size or status" or "eligibility for Federal procurements" [26,27,28]. Such matters are referred to SBA for resolution.
- 2) GAO defers challenges of eligibility under the Walsh-Healy Act to the Department of Labor, and,
- 3) GAO will not entertain ". . . a protest against an affirmative determination of responsibility . . . in the absence of a showing of possible fraud or bad

faith on the part of a contracting officer or a failure to apply definitive responsibility criteria" [26,29].

By the nature of its decisions, the GAO bid protest process has some characteristic features. First, GAO places an unstated emphasis on the timing of the protest.

. . . GAO considers the timing of the protest to be important. Where the protest is made after award . . . (GAO) may decide that, although the award was contrary to the rules, full performance . . . is nevertheless in the best interest of the Government. . . . [10]

Thus, protests subsequent to award are considered at the discretion of GAO and the best interest of the Government is factored into the final decision. Such late protests can gain the protestor "a moral victory, but a practical defeat--he gets no cigar" [30]. Second, even when the protest is valid and timely, GAO will not require award to the protestor, but grants the agency the right to resolicit or cancel. COGP reported :

If a protest is successfully made before award (and) the solicitation is somehow defective . . . no valid award can result and the solicitation should be cancelled . . . , and

If the protest before award alleges the proposed recipient . . . is ineligible, GAO will state that the award may or cannot be made. The agency retains the right.. to resolicit or cancel. . . . [4:157-158]

Taken together, these characteristics and other unstated decision criteria that can be found in the decisions create a bias that generally favors the Government contracting agency absent a showing of significant deviation.

GAO protests are considered informally by an assigned attorney based on the written record [2:6]. Proceedings are "ex parte"³ reviews based on the written record. Unless, or until, a protest is filed with the courts, GAO will process the matter. At the time of legal filing, GAO will dismiss any protest unless the court requests a GAO decision {4 CFR 21}. Decisions are rendered by the assigned attorney and, after high-level internal review, are issued by the Comptroller General.

d. Effect of GAO Recommendations

Yet another aspect of the constitutionality argument over GAO authority concerns the effective power of GAO decisions. The COGP report noted:

GAO has no power when adjudicating a protest to prevent the award of a contract or to have the contracting agency comply with the time requirements it has established for the processing of protests. GAO has never recommended money damages for a successful protestor, but it has recommended that the agency resolicit the procurement or terminate a previously awarded contract for the convenience of the Government [2:6].

COGP clarified the point further:

. . . GAO considers its bid protest decisions to be binding on the procuring agencies and that they "have no appeal from a GAO decision other than to request GAO reconsideration. [4:162]

The other side of the argument is the Justice Department position:

³Ex parte: Black's Law Dictionary defines this term as "on one side only; by or for one party; done for, in behalf of, of in the application of one party only. Ex parte hearings consider "only one side of the controversy."

. . . that GAO decisions in bid protest matters are not binding on the Executive Branch of Government because the Comptroller General has no statutory authority to perform this function. [4:229]

The continued presence of the argument can be found in the fact that, although the final reports are termed decisions, GAO still issues recommendations.

e. Right to Appeal

Another feature of the GAO forum is that ". . . a protestor . . . has the right to seek judicial review of his protest even after it has been considered by GAO" [4:162].

f. Issues, Criticisms, and Recommendations in the Literature

At the time of its 1972 ". . . study of the currently existing methods of recourse available to a contractor or prospective contractor in a protest against award", COGP found major problems confronting the award protest system [2:59,4:11]. CICA was partially aimed at solving some of the problems that COGP highlighted [1:3,100]. Other authors cite a general recognition that the GAO procedures were "unfair and ineffective" [24:11].

To emphasize what has been previously stated supra, COGP concluded "that the award protest system needs improvement in the interest of greater fairness and effectiveness" [3:95]. Three major problems were cited:

- 1) an absence of procedures and remedies that will assure fairness in the treatment of protestors,

- 2) delay in processing protests through the administrative forums . . . , and
- 3) the lack of an effective plan for reducing the number of protests. [2:7,3:95]

One symptom of the first two problems was GAO inability to "enjoin or stop performance by the successful contractor while the underlying protest issues were being decided" [25:10]. When coupled with procedural delay, a winning contractor could spend money and speed performance in the interim. A successful protestor could thus win only a GAO admonition to the agency not to repeat its mistake.

The COGP determined that the root cause was "the absence of a comprehensive, coordinated, and integrated regulatory scheme for administrative resolution and avoidance of protests" [3:95].

The following actions were recommendations contained in the final COGP report [3:96-100]:

- 1) Promulgate award protest procedures that adequately inform protestors of the steps that can be taken to seek review of administrative decisions in the contract award process.
- 2) Continue the General Accounting Office as an award protest resolving forum.
- 3) Establish, through executive branch and GAO cooperation, more expeditious and mandatory time requirements for processing protest through the GAO.
- 4) Establish in the executive procurement regulations, in cooperation with the General Accounting Office, a coordinated requirement for high-level management review of any decision to award a contract while a protest is pending with GAO.

- 5) GAO should continue to recommend termination for convenience of the Government of improperly awarded contracts in appropriate instances.
- 6) Improve contracting agency debriefing procedures.
- 7) Establish a pre-award protest procedure in all contracting agencies.
- 8) Conduct periodic reviews by GAO of agency award protest procedures and practices.

Only the second recommendation--to continue the GAO forum--drew a dissenting opinion. And then, the dissenter sought to redress the long-standing constitutional issue by shifting the function to the Department of Justice [3:96].

Two other conclusions were reported without a corresponding recommendation. First, the Commission "did not recommend" the "full battery of due process procedures used in court," rather, it endorsed simple procedures that "insure 'basic fairness' or objective consideration of award protest" [3:98]. Second, the report concluded that "consideration should be given to clarifying the statutory basis for court jurisdiction" and endorsed the use of injunctive relief and award of proposal preparation costs as damages" [3:99].

COGP summarized its recommendations as follows:

The award protest system, a necessary and beneficial aspect of the procurement process, needs improvement in the interest of greater fairness and effectiveness. The major problems confronting the system are (1) an absence of procedures and remedies that will assure fairness in the treatment of protestors; (2) delay in processing protests through the administrative forums; and (3) the lack of an effective plan for reducing the number of protests. At the heart of these problems lies the absence of a comprehensive, coordinate, and integrated regulatory

scheme for administrative resolution and avoidance of protests. [2:7]

The Study Group proposed two alternative award protest systems as replacements for the current system in their summary report. The alternatives differ in the number of forums and in the functions to be exercised by GAO [4:149].

(1) Alternative System I. This alternative maintains the framework of the existing system. As before, a protestor would have three options for protest: procuring agency, GAO, or the Federal courts. But the alternative differs by "addition of a rule making function for GAO and certain improvements in GAO procedures" [4:149].

The modified system would invoke time limits on the decision making process, eliminate the presumption of agency propriety, and require publication of GAO decisions. Additional changes to GAO procedures would permit an option for de novo⁴ hearings, if the GAO protest followed an initial decision at the agency level. A novel approach would grant GAO a rule making function "for the purposes of promulgating uniform bid protest procedures" that would be binding on the agencies [4:151].

⁴de novo: Black's Law Dictionary defines this term as "anew, afresh, a second time;" "as if no decision had previously been rendered."

The judicial forum would be retained and judicial remedies would include award of damages as well as full injunctive relief.

(Nine of 14 members favored this alternative.)

(2) Alternative System II. The second alternative award protest system proffered by the Study Group eliminated GAO as a protest forum. Protest to the contracting agency would be a required first step, but individual procuring agencies would decide such protests at a centralized level above, and independent from, the contracting officer.

During a fixed time established for receiving protests, awards would be withheld or work suspended. Later protests would be considered only if alleging fraud.

Upon an unsatisfactory decision by the agency, a protestor could seek de novo review in a "federal court empowered to enforce agency requirements, award damages, and grant injunctions."

The GAO role would be reduced to annual review of protest decisions and recommendations of procedural changes to the agencies, who would be free to accept or reject the proposed rules. [4:151-153]

(Only five of 14 members favored this option.)

4. Protest to the Courts

This third forum in the award protest system was described by COGP in a clear manner that merits quoting:

Until 1970, there were virtually no other forums available in this century for the adjudication of bid protests. The courts had consistently held that bidders had no standing to obtain judicial review of administrative actions taken in the contract award process because federal procurement statutes conferred no judicially enforceable rights upon offerors for Government contracts. Intertwined with this proposition was the concern expressed in some decisions that the court would be substituting its judgement for what were essentially discretionary acts of procurement officials, and, therefore, judicial bid protests were also dismissed on the ground that administrative procurement decisions were not reviewable by a court of law.

. . . . Not only was the offerer precluded from going directly to court to challenge administrative action, he was also precluded from seeking review of an agency or GAO decision on his protest. [4:162-164]

After opening the judicial process, the courts turned to the task of defining what relief which should be offered. Initial cases indicated broad remedies, but the trend circa COGP was to restricted use of injunctive relief and awards were limited to damages. [4:165] "The federal district courts have both injunctive powers and the power to award damages, however, the Court of Claims may only award damages" [4:166].

For cases appealed subsequent to GAO review, ". . . the court is not bound by statement of facts or law in the GAO decision and may examine the merits of the protest on a de novo basis" yet ". . . the court may properly take into

account the concurrence of the General Accounting Office" with the contracting agency's position" [4:166-167].

In *Scanwell Laboratories, Inc. v. Shaffer* (1970), the Court of Appeals for the D.C. Circuit opened the judicial forum. While *Scanwell* is most recognized as the decision affecting the right to protest, its greater value was the new potential for injunctive relief. The drawback to protestors in using this forum is that injunctions are extraordinary and are rarely granted. "To receive a restraining order before a court, one must demonstrate probability of success on the merits, irreparable injury, absence of substantial harm to other interested parties and absence of harm to the public interest" [5:6]. The difficulty in demonstrating a "substantial likelihood of prevailing on the merits" poses a sizable hurdle for many protestors [25:11]. In consequence, *Scanwell* never lived up to its "initial promise" [25:11].

A second case, *M. Steinthal & Co. v. Semms*, further confused use of the judicial forum. In *Steinthal* the Court indicated that it would sustain the agency award "if there was any rational basis" for the agency decision and also stated that "judges could exercise their discretion and grant no relief to protestors in cases where the challenged agency had no rational basis."

Thus *Steinthal* and other post-*Scanwell* decisions of the courts communicated "a strong disinclination toward

complex procurement litigation." These barriers in the judicial process left most protestors "mired in the GAO procedure." [25:11]

C. THE COMPETITION IN CONTRACTING ACT OF 1984

1. Introduction

The Competition in Contracting Act (CICA) of 1984, which is formally named "Title VII of the Spending Reduction Act and Deficit Reduction Act of 1984" and is also known as P.L. 98-369 modifies existing Federal procurement statutes and the GAO bid protest process. It "may stand out as being the keynote for government procurement processes during the next decade and perhaps much longer" [1:118,31:4].

Although passed only a few short months after the long awaited and much touted FAR became effective April 1, 1984, CICA forced major FAR revisions. (The FAR completely replaced prior procurement regulations for civilian and defense agencies with what was intended to be one concise, unified set of acquisition regulations applicable to all Federal agencies.) That CICA overpowered the release of FAR is one clear indication of its importance.

"CICA's main purpose was to increase competition in the award of government contracts", but ". . . in passing CICA, Congress sought to eliminate the imbalances in the protest system" as well [5:3,25:11]. The legislation was signed into law July 18, 1984. Bid protest provisions

became active January 1 while the remainder of the provisions became effective April 1, 1985.

2. The Language of the Act

A proper understanding of CICA begins with the literal and contextual meaning of the statute and progresses to the legislative intent and any subsequent judicial interpretation of the actual law. Since CICA is relatively new, judicial interpretations are very limited and the task is somewhat simplified. It is essential to grasp fully the intended consequences as well as the literal changes.

a. CICA Provisions

The major changes resulting from CICA can be summarized as follows [32:45]:

- eliminates preference for formal advertising and puts competitive negotiation on the same level as sealed bid procedures.
- eliminates the seventeen exceptions to formal advertising and establishes seven exceptions under which "other than competitive procedures" may be used.
- requires sealed bid procedures when four specific conditions are met, otherwise competitive proposals shall be requested.
- allows agency heads to exclude a particular source of supply in competitive procedures in order to establish or maintain an alternative source or sources of supply under certain conditions.
- allows the head of an agency to limit competition to small business concerns only, so long as all firms within the category are allowed to compete. (However, the exemption of the Section 8(a) program remains.)
- exempts small purchases (i.e., under \$25,000) but states competition must be promoted to the maximum extent practicable.

- lowers the threshold for the Truth in Negotiations Act from \$500,000 to \$100,000.
- lowers the threshold for Commerce Business Daily notices for solicitation and awards.
- requires an "advocate for competition" in each executive agency.
- requires an annual report to Congress from each agency.
- incorporates innovative protest and dispute procedures.

Other provisions of CICA established automatic data processing procurement protests as a separate category and directed them to the General Services Administration Board of Contract Appeals (GSCBA) as review authority.

Within the context of CICA, the bid protest features encompassed only a relatively small portion of the new law, not only in paper volume but in intent as well. However, the modifications are significant because they formally empower the Comptroller General (i.e., the GAO) to hear protests and to reformat the award protest system:

- by directing GAO to issue and publicize bid protest procedures;
 - by setting mandatory time limits for decisions on the merits of the protests;
 - by making protest injunctions virtually automatic;
 - by directing GAO to disregard intervening cost and performance factors in cases where the agency head overrides the suspension and allows contract performance to continue while the protest is pending; and,
 - by granting GAO the power to recommend any of several actions, including monetary award to protestants to cover bid protest and bid and proposal (B&P) costs.
- [25:11]

The most significant of these provisions is the suspension feature. Suspensions are automatic unless the Government "establishes that urgent and compelling circumstances which significantly affect the interest of the United States will not permit waiting for the decision of the Comptroller General" {31 U.S.C.3553(e)} [25:11]. The burden regarding suspensions is therefore, on the agency. Butterfield notes that ". . . this might represent the only circumstance in our jurisprudence where a party seeking . . . extraordinary relief does not have to prove anything to get that relief" [25:11]. "By the single expedient of merely filing a protest letter, the protestor achieves what traditionally has required a very substantial evidentiary showing" [25:11]. Thus, what has become widely known as the 22 cent protest--a passing reference to the postage needed to file such a protest.

b. Statutes Affected

Officially, CICA amends: the Federal Property and Administrative Services Act (FPASA) {Subtitle A}; the Armed Services Procurement Act {Subtitle B}; The Office of Federal Procurement Policy Act {Subtitle C}; and Chapter 35 of Title 31 of the U.S.C. {Subtitle D}. CICA also directs changes to the FAR {Subtitle E}. The text of the act readily correlates which sections of the above statutes are modified.

c. Correlation of Laws and Provisions

Generally, the CICA provisions modify the statutes cited above in a straightforward manner. Those provisions of CICA changing competitive procedures, sole source procurement, planning and solicitation requirements, cost and pricing data, and small business set asides affect both the FPASA and ASPA. Provisions relating to establishment of agency competition advocate affect the OFPP Act. Bid protest and dispute procedures affect Title 31, U.S.C. Finally, the Act directs that the FAR be revised to incorporate all these new policies.

d. Subtitle D: Procurement Protest System

Subtitle D of CICA contains the specific changes relevant to the bid protest system. It provides new wording for Section 3551, Chapter 35 of Title 31, U.S.C. Subtitle D basically addresses three categories of changes: provisions empowering the GAO; a set of changes requiring prompt resolution of protests; and, rules that automatically suspend contract award or require termination of execution while a protest is pending.

(1) Provisions Empowering the GAO. The first category of changes grants the Comptroller General the power to decide protests by interested parties concerning alleged violations of procurement statute and regulations [33:2741(a)]. Some aspects of the new GAO powers are often overlooked or played down in the literature. One is that

the Act establishes a "statutory right to limited sorts of discovery" in that "any interested party may request from the federal agencies involved any document relevant to the protest" although some competitive advantage exclusions remain [31:7]. A second power is the express authority to GAO to "verify assertions made by the parties," which implies giving GAO power to take sworn testimony and to issue subpoenas.

Additionally, GAO is given authority to receive protests referred by an executive agency or a court of the United States. Some authors believe the Act gives GAO entree to take a more active role in controlling the overall award protest system [31:7]. The Act explicitly states that "nothing in this section shall be construed to give the Comptroller General exclusive jurisdiction over bid protests" [32:2471(a)]. The judicial avenue remains available: the fragmentation of remedies problems remains unsolved.

The term "interested party," which is used throughout CICA, is defined in the Act: "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award the contract" {4 CFR 21.0(a)}. The term was used (without definition) in the bid protest procedures issued by the GAO on April 24, 1975 which became effective on or after June 2, 1975 {Sect 20.1(a)}. Since the use

of the term predates the Act, it is apparent that CICA did not open new territory in this case, but rather gave the wording a clear statutory position. Some authors believe the new definition "much more limited" than prior GAO interpretation [31:7].

The Act does; however, limit protests to either the judicial or administrative process: "an interested party who has filed a protest action under Section 111(h) of the Federal Property and Administrative Services Act of 1949" {41 U.S.C. 759(h)} . . . may not file a protest action . . . under this section. This language is more restrictive than prior GAO procedures which provided: "The Comptroller General may refuse to decide any protest where the matter involved is the subject of litigation before a court of competent jurisdiction" {4 CFR 20.10}.

The Act also empowers the Comptroller General to determine whether protests comply with "procurement statutes and regulations." The scope includes solicitations, proposed awards, and awards.

GAO is allowed to "dismiss a protest that the Comptroller General determines is frivolous or which, on its face, does not state a valid basis for protest." While seemingly innocuous, this feature allows GAO to eliminate significant delay and administrative overhead by summary

dismissals. GAO attorneys credit this clause as the basis for making the protest caseload tractable [8,11].

Where GAO finds noncompliance, they can "recommend" that the agency:

- (A) refrain from exercising any of its options under the contract:
- (B) recompute the contract immediately:
- (C) issue a new solicitation:
- (D) terminate the contract:
- (E) award a contract consistent with the requirements of such statutes and regulations:
- (F) comply with any combination of recommendations under clauses (A), (B), (C), (D), and (E), or
- (G) comply with such other recommendations as the Comptroller General determines to be necessary in order to promote compliance with statutes and regulations.

Note that GAO is only empowered to recommend to the agencies and not to force compliance. Furthermore, GAO may declare an "appropriate party to be entitled to the costs of: 1) filing and pursuing the protest including reasonable attorneys fees, and 2) bid and proposal preparation. Such monetary awards "shall be paid promptly by the executive agency . . . out of funds available for the . . . procurement of property and services. . . ."

This category also includes a requirement that GAO provide a copy of each decision; signed by the Comptroller General, or his designated representative, to protesters and agencies.

The Comptroller General is required by CICA to report to each House of the Congress by January 31 each year describing "each instance of an agency failure to comply with the Comptroller General recommendations during

the preceding fiscal year." As part of this clause, ". . . the head of the procurement activity responsible for award of contract shall report to the Comptroller General, within 60 days of receipt of the Comptroller General's recommendations, if the agency has not fully complied with such recommendations."

(2) Provisions Requiring Prompt Resolution of Protests. A second category of the subtitle of the CICA dictates that the final protest decision be issued within 90 working days, absent a written decision based on exceptional circumstance. In order to achieve the 90 day constraint, the Act stipulates executive agencies be notified within one working day and a 25 day limit for executive agency submission of a complete report which includes copies of all relevant documents. (The time constraints can also be relaxed by the Comptroller General for exceptional reasons.) This concern for "inexpensive and expeditious resolution of protest" also appears in language that requires an "express option" that limits final decisions to 45 days and executive agency report submission within 10 days. GAO is granted the latitude to determine which protests are "suitable for resolution" under the express option.

(3) Provisions Requiring Stay or Award or Contract Termination. The third distinct category of clauses affects contract execution: "A contract may not be awarded . . . after the contracting officer has received

notice of a protest to the Comptroller General and while the protest is pending." This provision adds the exception that

. . . the head of the procurement activity responsible may authorize the award of contract . . . upon a written finding that urgent and compelling circumstances which significantly affect the interests of the United States will not permit awaiting the decision of the Comptroller General . . . after the Comptroller General is advised of such finding.

Such a finding may not be made unless the "award of the contract is otherwise likely to occur within 30 days."

A second clause mandates that contract performance be ceased or the contract suspended for post-award protests filed within 10 days of contract award. Again, the head of the procurement activity can notify the Comptroller General and authorize performance based on a written finding that "contract performance will be in the Government's best interest" and that the "urgent and compelling interests of the United States will not permit awaiting the decision of the Comptroller General."

CICA limited such findings to the head of the procuring activity alone: the authority cannot be delegated.

In the case of continued contract performance, CICA directs the Comptroller General to:

make his determination of the appropriate recommended relief (if the protest is sustained) without regard to any of the costs of disruption from terminating, recompeting, or awarding the contract. . . . [33:2741]

3. Legislative History of the CICA

Since the finite wording of the Act is neither exhaustive nor definitive in terms of specifying exactly what the Congress intended, it is important to view the entire record to gain a valid perspective. Such a global view is the same as that sought by the courts when they retroactively interpret laws. Selected pertinent history of the Act can provide a shortcut in gaining that perspective.

CICA was "the culmination of an effort begun by the Senate Governmental Affairs Committee to establish a uniform government wide procurement statute to replace the ASPA (of 1947) and the FPASA (of 1949), and to implement other recommendations of the 1972 Commission on Government Procurement" [5:2]. The initial, yet unsuccessful legislative effort was S.1264, the Federal Acquisition Act of 1977, sponsored by Senators Chiles (D-Florida) and Roth (D-Delaware) [32:29]. The intent of S.1264 was ". . . reform (of) old basic laws and (replacement with) . . . a modern statute aimed at far more intensive and innovative competition," including reduced numbers of sole source awards and cutback in the use of detailed specifications [32:29].

A second legislative foray, the Competition in Contracting Act of 1982, S.2127, was also unsuccessful, however, it was later reintroduced as the Competition in Contracting Act of 1983, S.338 by Senators Cohen (R-Maine)

and Levin (D-Mich.) [32:29;34]. S.338 included much of the final version language, but did not address any bid protest process changes [34,35].

Between the deliberations over S.1264 in 1977 and S.338 in 1982, several events occurred that influenced the final outcome. First, in November 1979 the GAO released a report titled DOD Loses Many Competitive Procurement Opportunities which accused DOD for myriad abuses in awarding noncompetitive contracts [32:29]. Second, much of the testimony in hearings before the Senate Committee on Government Affairs focused on increasing trends to more noncompetitive procurement. Third, a second GAO report Less Sole Source, More Competition Needed in Federal Civil Agencies Contracting issued in April 1982 also criticized the nondefense agencies [32:32]. Fourth, the Congress found "what they felt was a relationship between negotiating in the last minute of the fiscal year and unnecessary noncompetitive contracting" [3:32]. Fifth, in what can only be considered a major blunder, the highly-touted Carlucci Initiatives which related to defense acquisition reform omitted any reference to increasing competition. Sixth, in the latter part of this period, President Reagan engineered a major reverse in defense spending to the detriment of other budget programs near and dear to the constituents of Congress. In the face of defense budget growth, the continued apparent bad DOD management (as evidenced in the

events above), and other highly visible problems such as exorbitant spares prices (that received extensive national publicity) the Congress was motivated to act.

The final form of CICA resulted from a compromise merger of S.338 and a House Resolution (H.R.5184) sponsored by Rep. Jack Brooks (D-Texas). A third resolution submitted by Rep. Price (D-Ill.) entitled Defense Procurement Reform Act of 1983, H.R.2545, became part of the final version of CICA as well [31:4].

S.338, the outgrowth of the aforementioned S.2127, embodied the following changes [32:37]:

- equal statutory preference for sealed bid and competitive negotiation;
- reduced circumstances for noncompetitive procurement (6 exceptions);
- greater public notice, (i.e., CBD publication);
- dual source procurement allowed for certain reasons;
- required use of advanced procurement planning and market research;
- required designated competition advocates;
- lowered the Truth in Negotiations Act threshold to \$100,000; and,
- required annual report to Congress.

The intent of S.338 remained the same as S.2127 before: to stimulate competition, to drastically restrict sole source usage, and to decrease the use of excessive specification.

The general intent of the House resolutions was also to reaffirm competition, but the House favored use of GAO as

an enforcement provision. H.R. 2545 was more narrowly focused on DOD procurement and did not include any bid protest process reform language [AA]. In contrast, H.R. 5184 authorized GAO authority to hear bid protests and to make a broad range of determinations. It contained extensive bid protest procedures language that was merged into the final form of the CICA during joint conference by deft political maneuvering.

The entire legislative package gained approval as an amendment to the House version of the Deficit Reduction Act of 1984, which was sent to joint conference committee. The final product generally reflects the Senate form for competition matters and the House versions for bid protest elements.

4. Summary of Congressional Intent

"CICA's main purpose was to increase competition in the award of government contracts" [5:3]. By establishing the legislative requirement to compete regardless of the method of procurement used--sealed bid or competitive negotiation--CICA clearly states this Congressional purpose.

The method obvious to a naive reader--to incorporate competition as a legal requirement into the U.S. statutes--would have been largely redundant, since the legal basis for competitive contracting dates to 1792 and has been reaffirmed many times prior to CICA [36:23-38].

The record of Congressional intent yields a slightly differing understanding. Several conceptual approaches underlie the final compromise legislation. At least five Congressional policies are embodied to a greater or lesser extent in the final Act:

- 1) greater use of advance planning associated with contracting;
 - 2) greater use of market research to buttress the advance planning;
 - 3) desires to simplify and expedite the acquisition process;
 - 4) greater use of commercial products to meet government needs; and,
 - 5) improved use of functional and performance specifications in lieu of detail specifications.
- [1:122-126]

In the final analysis, CICA is an amalgamation of these legislative initiatives directed at a variety of Federal procurement abuses and shortcomings that continued to rankle Congress over a period of years. The final product reflects CICA's multiple origins: multiple changes to four major laws (FPASA, ASPA, Title 31 U.S.C., and the OFPP Act) that were enacted in a complex and not fully integrated fashion. "Although the CICA started on the right track, it ended up with a curious array of remedies that not only did not resolve all problems, but created a whole new series of problems for procuring agencies" [25:12].

Analysis of Congressional desires provides some insight to its plan for the bid protest process modifications as well. One clear intent of Congress was to establish a "series of checks and balances provided by

increasing levels of review" in order to frustrate any effort to continue directing awards to a specific contractor and to better limit unnecessary sole source contracting [1:2]. Several provisions of the Act provide the desired checks and balances. The provisions for a Competition Advocate require an organizational restructure to enforce the dictate to compete. New publication requirements provide better public awareness and a built-in alarm system against abuses. Specific reports are required to provide continued Congressional oversight. The final element of the checks and balances was the establishment of new bid protest procedures at the GAO. These procedures

. . . insure that the mandate for competition would be followed by providing offerors a meaningful opportunity to protest an inappropriate government action, and if appropriate, the chance to secure a meaningful remedy. Thus, potential contractors would have the means to police the system. [5:3]

5. Implementation Issue: Constitutionality

Normally implementing new legislation is straightforward. This was not the case for CICA. The bid protest provisions of CICA give broad powers relating to judicial review and executive action to the Comptroller General, a member of the legislative branch. Judicial review is properly the domain of the judicial branch; execution of contracts is traditionally an executive branch function. Upon review, the Department of Justice determined that the bid protest provisions constituted an abridgement of the separation of powers doctrine and was therefore,

unconstitutional. In a controversial kickoff for CICA, President Reagan signed the law, stated his belief that these provisions were unconstitutional, and directed that the "Department of Justice inform all executive branch agencies as soon as possible how they may comply with the provisions of this bill in a manner consistent with the constitution" [37:6]. The Office of Management and Budget (OMB) issued a noncompliance directive. Congressional hearings were conducted and lawsuits were filed. After lengthy maneuvering, Congress outlasted the executive branch by withholding DOJ operating fund appropriations. In June 1985, all resistance was removed and the act became fully operative [32:47-51].

6. Predicted Consequences

Writing in a 1985 revision to his text Government Procurement Management, Stanley Sherman, an experienced government contracting observer, labeled CICA a "statutory cornucopia" [1:118]. Sherman offered a number of his own forecasts about what consequences would be felt as a result of the new law. Among his many observations Sherman predicted [1:129]:

First, a number of new statutory administrative efforts will substantially increase procurement administrative lead time for competitive negotiation efforts.

Second, CICA further complicates the procurement process rather than simplifying it.

Third, the CICA provision that permits agency heads to exclude sources when necessary to enhance competition will, in fact, enhance competition and will concurrently "stimulate (bid) protests."

Fourth, procurement administrative lead time will increase somewhat due to bid protest delays.

Two areas were avoided by Sherman. He offered no opinion about whether CICA will actually increase competition. Neither does he opine about whether the number of bid protests will be significant. These omissions are likely not significant, but rather indicate areas of greater doubt.

A second author volunteered:

. . . these statutory provisions have the potential for making bid protests a much more meaningful form of relief and for encouraging contractors and their attorneys to file protests more frequently . . . of course, this incentive will only work if the General Accounting Office awards these with more regularity. [31:7]

Preston suggested that ". . . the issue of bid protests may prove to be one of the most litigated areas as a result of CICA changes" [5:7].

7. Criticisms in the Literature

Butterfield cited several weaknesses and inconsistencies in CICA. First, the mandated time limit is 90 days for GAO and 45 days for GSBCA. There is no reason for the difference since GSBCA must accomplish a more

complex process. He felt that both should be able to perform in 60 days. [25:11-12]

Second, Congress intended that continuing performance costs be eliminated as a problem, but failed to specifically include such along with "any cost or disruption for terminating, recompeting, or reawarding" contracts in those cases where the agency continues contract performance under the "best interests" standard [25:11]. Third, the statute is "vague on the critical point of whether and to what extent consideration should be given to intervening cost and performance factors." Butterfield's recommendation is that the prohibition against consideration of intervening events be strengthened and the automatic suspension function be deleted as an "unnecessary remedy." An absolute prohibition to GAO against consideration of intervening events would provide a fair system by "foreclosing the possibility that intervening events will color or prejudice the ultimate decision" [25:12].

Preston stated that the CICA legislation affecting bid protests "was not considered thoroughly before its adoption." Among her criticisms are the following:

- CICA fails to establish time limits for protests to the contracting agency;
- the 10 days after award available for protest to the GAO is not interrupted by an undecided protest to the contracting agency;
- the provision allowing "a protestor to secure an injunction of the agency's activities for the price of a 22-cent stamp . . . seems extreme" [5:22-23].

- difficulties with the new GSBCA forum resulting from a differing approach and decisions than the GAO;
- imprecise language in the provision that permits invalidating a procurement for violation of a law or statute regardless of whether any interested party is injured; and
- ambiguity in jurisdiction between GAO and GSBCA. [5:6-8]

Preston recommends that protests after award be held to the judicial standards in order to gain termination or that, alternatively, the "protestor be required to reimburse the government for costs incurred as a result of suspending performance and defending the protest if the protest is found without merit" [5:23].

D. SUMMARY

In the problem statement contained in the first chapter, three elements were stipulated: 1) to define the award protest system; 2) to determine what CICA altered and why; and 3) to locate and quantify functional measures of the process. The reported literature research has addressed the first two elements.

Furthermore, the literature research has provided answers to several of the research questions initially posed.

1. The Causes Leading to CICA

Review of the findings and recommendations of the COGP study performed in the 1969-1972 period provides a synopsis of prevailing thinking regarding the GAO bid

protest process. COGP found an award protest system that consisted of three processes: contracting agency, GAO and judicial. The three processes originated separately and were so poorly integrated that the Study Group members considered the system "unfair and ineffective." Three major problems were cited: absence of procedures and remedies that assure fairness; delays in processing protests; and lack of a plan to reduce the number of protests. COGP cited an underlying lack of a comprehensive, coordinated, and integrated scheme that would unify the overall system in a manner that would assure fair and equitable treatment for all protestors. CICA seems to have addressed procedures to assure fairness and requirements to mitigate the delay, but nothing in CICA focuses on the matter of reducing the number of protests nor does the statute address unifying the total system. Rather, CICA talks only to the GAO (and GSBICA) forums. The criticism that CICA was not completely thought through before enactment is all the more poignant.

The contracting agency practice of awarding in the face of a protest to GAO drew only a modest COGP recommendation for coordination. Congress obviously thought the matter deserved more attention.

2. The Primary Objectives For Bid Protests in CICA

Examination of the legislative history of CICA provides the answers to this research concern. Foremost, CICA was intended to be an enforcement mechanism to assure

that the new emphasis on competitive contracting could be enforced--especially, by the contracting enterprises of the private sector. The directive to publish anew GAO bid protest procedures was one way in which to serve notice to the private sector that a new spirit prevailed. Making the system function more efficiently in terms of response time was a second favorable modification.

A less obvious intent of CICA language was to clean up old business. For fourteen years Congress had not acted on the COGP recommendations--since the 1972 Final Report. Without explanation, Congress selected some of the list of COGP recommendations and included them in the final compromise legislation while omitting others. CICA included the COGP recommendations to promulgate GAO procedures; continued GAO as a forum; established mandatory time limits for protest resolution; and fixed a requirement to coordinate decisions in the face of a protest. The recommendations that Congress chose not to address were those that specifically involved contracting agency requirements or integrating contracting agency and GAO procedures such as, uniform pre-award protest procedures or annual GAO reviews of agency practices. It is curious that Congress did not act on the full range of COGP recommendations.

The automatic stay and termination provisions were not recommendations from any organized body. Rather, these

features seem to be a poorly considered, Congressional reaction to a symptom identified in committee deliberations. The intent of these provisions appears more punitive than effective.

3. The Post CICA GAO Bid Protest Process

Overall, the tri-forum award protest system is unchanged. All of the changes affect only the GAO bid protest forum. While COGP recommended two alternative systems, Congress selected neither and elected to fashion its own variant of that which already existed.

As directed by CICA, GAO published its award protest procedures anew. But the procedures differed relatively little. The definition of interested party might be slightly more restrictive about who may file a protest, but if it is, there is little accumulated evidence to date. Procedures about how and where to file are basically unchanged.

The most obvious differences are the mandatory time limits imposed on the agencies and GAO and the automatic stay provisions. The time limits are now requirements to the agencies, whereas before they were GAO requests that were largely ignored. Stay and termination features reflect the language of CICA directly.

A less obvious feature is the dictate to GAO to ignore intervening cost and performance factors in deciding cases that have been awarded in the face of protests.

Similarly, the recommendations that GAO may now authorize are somewhat expanded; but the changes are not overwhelming. Most significant are the requirements that allow GAO to award bid and proposal costs and attorney fees, which the agency must take out of appropriation funding.

Nowhere in the literature is the subject of what happens if the agency chooses to ignore GAO discussed. It would seem to be a logical offshoot of the constitutionality issue that surfaces time and again.

IV. GAO BID PROTEST DATA AND ANALYSIS

A. INTRODUCTION

Some of the research questions posed in Chapter I were resolved during the course of the literature search described in Chapter III. Responses to the remaining questions required research, specifically data collection and analysis that will be described in this chapter and the next. This chapter specifically addresses GAO measures of the GAO protest process, while the next treats Navy field contracting activity data. Both data collection results and analyses will be addressed in an integrated fashion.

Section B describes what types of data are available. Section C provides actual GAO data and analysis. As will become evident, it is convenient to deal with the numerous statistics in the categories of the systems theory framework suggested earlier. Specifically, the subsections treat process inputs, process transform measures, and output measures. These systems engineering categories simply provide a mechanism for separating an otherwise cumbersome amount of data. Section D is a summary.

B. GAO BID PROTEST PROCESS DATA MEASURES

The data source limitations mentioned in Chapter II dictate a focus on available data, specifically those statistics used by GAO to manage its own operations. First,

because GAO data have changed significantly over time in terms of what is reported, it is important to understand how these data evolved. Second, the measures actually used for collection and analysis are summarized. Third, the fragmented data for the transition year in which CICA was enacted are discussed.

1. Evolution of the Statistics Reported

a. Pre-CICA Reporting

The level of detail of GAO statistics prior to CICA was limited, but it evolved significantly after the early 1970's. In the opinion of the researcher, the explanation is an increasing number of contracts which leads to an increase in award protest volume accompanied by inevitable Congressional interest generated in response to constituent concerns and consequent reactive management of the process. Hence, greater information detail has been demanded and reported.

In the early 1970's, GAO reported simply the number of protests denied and sustained, the number of formally advertised and negotiated method contracts, and the number of protests for procuring agencies with the highest protest activity [7:455:A14;7:514:C-1].

By FY 78, the following statistics were used by GAO to record bid protest performance:

- protests denied;
- protests sustained;

- protests dismissed;
- advertised procurements;
- negotiated procurements;
- protests received and decided before award;
- protests received and decided after award;
- protests received before award and decided after award;
- (cases in which) corrective action recommended;
- corrective action recommended under P.L. 91-510;
- reconsiderations;
- contract cancellation/termination recommended;
- protests where decision rendered;
- withdrawals before decision;
- total protests closed during fiscal year;
- total protests received during fiscal year; and,
- review of awards under grants. [7:775:A-16]

These expanded statistics add some detail, but the main difference is the introduction of time of decision measures. Between FY 79 and FY 84, GAO reported values for each fiscal year plus the prior four years for many of these measures. This practice was discontinued with the post-CICA reports.

In its FY 81 report, GAO introduced a new statistic, the ratio of the number of cases sustained to the number of cases developed [7:910:A-13]. This ratio measures protestor success rate for those cases that are actually heard. It was intended apparently to be a barometer of

award protest success rate, in that the "chaff" of early withdrawals and dismissals is winnowed. The FY 81 report also added case disposition data, to wit:

- agency adopted GAO recommendation;
- agency proposed alternative action with which GAO concurred;
- agency rejected recommendation; and,
- agency response not received by close of fiscal year.
[7:39:37-41]

Average time to disposition, average GAO time, decision time for developed cases, and decision time for summary decision cases were also introduced. Finally, summary disposition data for protests by agency were introduced. Rather than an abbreviated list of agencies experiencing the most protests, complete agency protest data were provided.

The format was used without change in FY 82, 83, and 84.

b. Post-CICA Reporting

In a clear break with precedent, the Comptroller General submitted the FY 85 and FY 86 (i.e., post-CICA) summary statistics to Congress as well as releasing them. This was accomplished by marrying the data to the CICA report required at 31 U.S.C. 3554(e)(2) regarding "each instance in which a federal agency did not fully implement a recommendation . . . during the prior fiscal year" [9:1]. Since Congress never asked for the information, GAO motivation for submission may subtly serve another purpose.

The FY 85 report distinctly contrasts data before and after January 15 while adding the following information to the growing list:

- contracting agency response time;
- procurement issue areas; and,
- bases for notice dismissal. [9]

The FY 86 report is the latest available. It provides unprecedented levels of detail generated by an automated document tracking system installed to cope with increasing award protest volume which was anticipated to grow more in consequence of CICA [10].

All of the measures used in FY 85 monitoring were again reported as well as several new measures such as:

- filing status by defense and civilian agencies;
- measures of continued performance in the face of protest;
- bases for dismissal after full development;
- bases for dismissal by summary decision;
- bases for dismissal by notice decision; and,
- detailed statistics for selected reporting activity data. [10:7-25]

In the FY 85 report, GAO introduced a new statistic, overall protestor effectiveness rate. GAO termed it "... a calculation of the probability that a protestor obtains meaningful relief" [10:5]. Previously GAO reported protestor success as the ratio of sustained to developed cases. This ignored cases withdrawn or dismissed as academic

for which the contracting agency voluntarily took corrective action in response to the protest. Thus the new protestor effectiveness rate measure represents the percentage of protests filed that result either in voluntary corrective action by the contracting agency or in a decision sustaining the protest. Effectiveness data were reported for various contracting agencies along with summary values. Presumably, this new statistic is a more accurate measure of the success achieved by protestors in using the GAO forum.

GAO also included for the first time an analysis of protest caseload by issues similar to that reported by ASBCA [7:45:309].

Otherwise, the FY-86 report continued the trend of adding information. Analysis of the bases for dismissal after full development, bases of dismissal by notice decision, and selected detailed reporting activity data were appended to those data submitted for FY 85.

2. Summary of Statistical Measures Available

The various significant performance measures used by GAO at one time or another during the time period of interest are summarized in Table 2. These data comprise a baseline for data accumulation and provide a starting point for analysis. Although data values do not exist for some measures in all reporting years, most have values for the FY 80 to FY 86 period.

TABLE 2

VARIOUS STATISTICAL MEASURES USED BY GAO
FOR BID PROTEST PROCESS PERFORMANCE

INPUT MEASURES

TOTAL PROTESTS RECEIVED DURING FISCAL YEAR
INITIAL PROTESTS
RECONSIDERATION REQUESTS
ADVERTISED/SEALED BID PROCUREMENT
NEGOTIATED/COMPETITIVE PROCUREMENT
ISSUE AREA

TRANSFORMATION FUNCTION PROCESS MEASURES

FILING STATUS
 PROTESTS RECEIVED AND DECIDED BEFORE AWARD
 PROTESTS RECEIVED AND DECIDED AFTER AWARD
 PROTESTS RECEIVED BEFORE AWARD AND DECIDED AFTER AWARD
PROCESSING TIME
 AVERAGE TIME FOR AGENCY ACTION/RESPONSE
 AVERAGE TIME FOR GAO REVIEW AND FINAL DECISION
 AVERAGE DISPOSITION TIME
 AVERAGE TIME TO DECISION
RATIO OF SUSTAINED TO DEVELOPED CASES
PROTESTOR EFFECTIVENESS RATIO

OUTPUT MEASURES

TOTAL PROTESTS CLOSED DURING FISCAL YEAR
WITHDRAWALS BEFORE DECISION
PROTESTS WHERE DECISIONS RENDERED
 PROTESTS DENIED
 PROTESTS SUSTAINED
 PROTESTS DISMISSED
CORRECTIVE ACTION RECOMMENDED
CONTRACT CANCELLATION/TERMINATION RECOMMENDED
RECONSIDERATION

DETAILED AGENCY PROTEST DATA

AGENCIES WITH THE HIGHEST NUMBER OF PROTESTS
COMPREHENSIVE AGENCY PROTEST DATA

Source: Developed by Researcher

At least two measures are clearly not of interest in this research and are subsequently disregarded. GAO data reported for corrective action recommended under P.L. 91-510 and matters relating to grants are ignored as beyond the scope of this research.

3. The Transition Year: FY 85

Government fiscal years begin each October 1, for example: FY 85 spanned October 1, 1984 to September 30, 1985. CICA became effective January 15, 1985. Thus FY 85 had two parts; from October 1 to January 15 bid protests were handled in the pre-CICA manner, while CICA procedures applied after January 15. GAO reported FY 85 data for three and one-half months prior to CICA; eight and one-half months post-CICA; plus FY totals.

Recognizing this fact does not equate with being able to apply the data clearly. GAO usually reports on an annual basis without providing monthly data or insight into month-to-month variations. Mathematically, one can easily convert the information for the two partial years to twelve month equivalents. One is then faced with the dilemma of selecting which of three annual statistics to use for FY 85: actual, pre-CICA equivalent, or post-CICA equivalent.

This problem recurs throughout the Chapter. The value of the three possibilities selected depends on the situation and will be addressed each time it arises.

C. PRESENTATION OF GAO DATA

1. Introduction

Data for each of the statistics cited in Table 2 are presented, discussed, and analyzed in the following sections. These data were derived from multiple references [7]. In adhering to the analytical framework, the reported statistics are grouped by natural associations which reflect the systems theory theme. The twenty-plus statistics available from GAO are grouped functionally as measures of bid protest process input; measures of transform process control; and, measures of output control.

When available, certain baseline data will be provided from the 1972 COGP Report to provide a reference. [2,3,4,24]

Although this research is focused on the six years surrounding CICA enactment, i.e., FY 80 through FY 86, data collection is expanded when data are available to encompass the period 1976-1986. This amplification is a consequence of two factors: first, the data being reported are not otherwise widely available in contracting literature; and, second, some analytical methods require a basis greater than two or three years to ensure real trends rather than short range anomalies are studied.

2. Measures of Bid Protest Process Input

a. Presentation of Primary Data

One fundamental measure of any process is the volume of system input. Three statistics relate to GAO bid protest process activity accommodated by GAO: total protests received; initial protests; and, reconsideration requests. Additionally, some characteristics of these inputs received are of interest, so they are reported as well. The other data associated with process inputs reported in this section relate to characteristics of the inputs received: protest issue areas and prospective contract method segregation.

Total protests received is a gross indicator of the maximum demand for GAO hearings and decisions. This summary input measure comprises several components. There are not only initial protests (as one might guess), but also inputs from reconsideration requests. Reconsideration requests arise 1) when the protestor is dissatisfied with either a dismissal or denial, or 2) when a contracting agency desires that a sustained bid protest be heard anew [8,11]. In addition to initial protests and reconsideration requests, GAO heard grant protests for several years, although these are a very small portion of total protests.

COGP reported 1,227 total protests to GAO in FY 72. While COGP was obviously aware of the total protest

measure, they deemphasized it in their report in favor of protests decided [24].

Total protests received, initial protests, and reconsideration requests are presented by fiscal year in Table 3. Generally, GAO reports values for these data each fiscal year in unambiguous fashion. Although the initial protest and reconsideration request data were not reported in early years, the number of reconsiderations actually decided was reported. For purposes of completeness, reconsiderations actually decided are included (with appropriate notation) in the table as a minimum value for the reconsideration request statistic.

The total number of protests received includes all correspondence filed at the GAO associated with a bid protest, thus it reflects total activity level. GAO attorneys advised the researcher that the numbers include all identifiable protests including those that do not clearly state a cause for protest or are otherwise ambiguous in intent. If the number is in error, it errs on the high side.

b. Analysis of Primary Data

(1) Total Protests Received. Since total protests are a measure of contractor willingness to file protests, it would be significant if trends differ before and after CICA. Various methods will be used to try to determine whether trends and any shift corresponding to CICA

TABLE 3

GAO BID PROTESTS RECEIVED
(BY FISCAL YEAR)

	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1985	1986
	Pre-CICA											
TOTAL PROTESTS	1,737	1,607	1,445	1,577	1,612	1,899	2,462	2,639	2,071	997	2,011	2,891
INITIAL PROTESTS	N/A	N/A	N/A	N/A	N/A	1,804	2,295	2,501	1,937	948	1,760	2,552
% OF TOTAL	N/A	N/A	N/A	N/A	N/A	95.0	93.2	94.8	93.5	95.1	87.5	88.3
REQUESTS FOR RECONSIDERATION	92*	84*	87*	91*	89*	95	167	138	134	49	251	339
% OF TOTAL	5.2	5.2	6.0	5.8	5.5	5.0	6.8	5.6	6.5	4.9	12.5	11.7

* Requests for reconsiderations for which a decision was rendered. Does not include requests for reconsiderations not decided.

Source: Compiled by Researcher [7]

are identifiable: including trend analysis and forecasting techniques.

One method of examining these data is the trend analysis provided in Table 4. The first observation must be that bid protest have increased, more or less consistently, since 1970 at an average of approximately 115 additional protests per year. The annual fluctuations in numbers and percentages are drastic in both directions. Generally, the total quantities ebbed slowly from FY 76 to FY 78, turned around in FY 79 and increased substantially from FY 80 to FY 83. A shift downward occurred in FY 84. Analysis of FY 85 transition year data is strained. Using the extrapolated annual rates as sequential data, pre-CICA FY 85 is an enormous 65% spike, followed by a 17% turn downward in post-CICA FY 85 and scant 2% growth in FY 86. Alternatively, we can consider the actual data for the partial year of input, i.e., pre-CICA values reported for the 3 1/2 months from October 1 through January 14 plus post-CICA data for the 8 1/2 month period beginning January 15 and ending September 30. Using actual values, FY 85 increased 45% over FY 84 while FY 86 decreased 4% from the FY 85 level. By comparing the results of the two methods, it is obvious that simple percentage growth figures will not resolve whether a shift occurred concurrent with CICA.

The second analytical approach involves forecasting methods. If the total protests received are

TABLE 4

ACTUAL TOTAL BID PROTEST TRENDS

<u>Fiscal Year</u>	<u>Total Bid Protests</u>	<u>Quantity Change</u>	<u>Percentage Change</u>
76	1,737	N/A	N/A
77	1,607	-130	- 7.48
78	1,445	-162	-10.08
79	1,577	+132	+ 9.13
80	1,612	+ 35	+ 2.22
81	1,899	+287	+17.80
82	2,462	+563	+29.65
83	2,639	+177	+ 7.19
84	2,071	-568	-21.52
85	3,008	+937	+45.24
86	2,891	-117	- 3.9

ALTERNATIVE: EQUIVALENT TOTAL BID PROTEST TRENDS

84	2,071	-568	-21.52
85 (Pre-CICA)	3,418	+1,347	+65.04
85 (Post)	2,837 ¹	-579	-16.94
86	1,891	+ 52	+ 1.83

¹FY 84 to FY 85 CICA Rate Change: 37.08%

Source: Calculated by Researcher

considered analogous to product demand, a production and operations management (POM) framework is suggested. One POM approach for analysis of input data is demand forecasting.

Three analytical techniques are commonly used: 1) regression analysis, 2) moving average method, and 3) exponential smoothing. Each will be addressed below. [38]

There are two ways to use linear regression in this situation: 1) the analysis can be done using only pre-CICA data which provides comparison predictions that lie outside the range of analysis; or 2) all available data values can be used to determine predictions within the range of analysis. Predictions are then contrasted to actual values. Several alternative calculations were made using these two methods for the various transition year values. All have good correlation coefficients, yet none are outstanding. The forecasts generated by the various regression analyses are neither consistent nor conclusive. The predictions are over, under, or near the actual values depending on the analytical assumptions one chooses. If forced to select one set of assumptions, the researcher favors regression of all actual values because it permits comparisons of predicted and experienced values within the range of analysis and the correlation coefficient is best at 0.928. Results of this model indicate that FY 85 experience was 12.4% above expectation and FY 86 experience was 2.4% over expectations. The coefficient of determination for this model is 0.8613. This coefficient is a "measure . . . (of) the percent of variations (of total protests) that is explained" by the yearly increase. Stated conversely,

approximately 14% of the increases seen are not a consequence of routine annual growth. [38:85]

A four year moving average forecast indicates that actual post-CICA experience significantly exceeded the forecast values. The exact amount of the increases depends on the assumptions made in handling the FY 85 transition year data values. The approach favored by the researcher uses actual annual totals and indicates a 34% increase in actual FY 85 protests over those predicted plus a further increase of 10% above prediction in FY 86. One of the recognized weaknesses of the moving average method is its tendency to lag changes, so the 34% difference for FY 85 may be overstated somewhat [38:97].

The remaining forecasting technique is exponential smoothing. Using a commercial software package, forecasting errors were calculated for various smoothing constants, which are called alpha values. The most accurate forecast occurs for alpha equal to 0.8 which indicates the next forecast value is very highly sensitivity to the error between forecast and actual value of the most recent period. The predicted values for FY 85 and FY 86 are 2172 and 2840 respectively, indicating that FY 85 actual experience exceeded the exponential smoothing predictions by 39% and FY 86 experience was also up 2%. These predictions must be viewed skeptically in face of overall figures of merit for the model that indicate only fair performance.

It remains then to correlate the results of the various methods to establish whether a noticeable shift occurred in the trends at the time of CICA. The various forecasts summarized in Table 5 have been combined subjectively based on limitations and biases inherent in the various models and with considerations afforded to the figures of merit for each model.

TABLE 5
CHANGES IN NO. OF TOTAL PROTESTS

<u>Method</u>	<u>FY 85 Percentage Change</u>	<u>FY 86 Percentage Change</u>	<u>Comments</u>
Trend Analysis	45.2	3.9	Actual annual totals
Trend Analysis	37.1	1.8	FY 85 CICA Equivalent Annual Rate
Regression Analysis	12.4	2.4	Model fair
Moving Average	33.9	10.2	Model fair FY 85 biased low
Exponential Smoothing	38.5	1.8	Model fair
SUMMARY OPINION	+30-35%	+2-10%	

Source: Calculated by Researcher

The opinion of the researcher is that actual FY 85 experience exceeded the forecast level of protests by

approximately 30-35%, while FY 86 was 2-10% higher than predicted. Recalling that the new FAR was implemented in April 1985, there were two major perturbations that occurred to Federal procurement in the same fiscal year. The magnitude of the FY 85 spike is likely an anomaly; real CICA impact is probably of the order of a 5-10% increase in total protests. FY 87 data will be essential to confirm whether a real long term shift has occurred. It must be emphasized that the various forecasting methods used do not present compelling evidence.

(2) Initial Protests Received. Initial protests received are the dominant component of the total protests received and may be the only true measure of external input. The numbers of initial protests received by GAO have been reported only subsequent to FY 81. Between FY 81 and FY 86, initial protests averaged 92.5% of total protests. Presumably, the volume of initial protests should be a function of factors such as the number of Government contract solicitations; the quality of Government solicitations; contractor awareness of the bid protest process; and contractor expectations of the process. Secondary determinants for some of these factors can also be postulated; for example, the quality of Government solicitations can be influenced by adequate numbers of contracting personnel, the experience and learning levels of such individuals, or instabilities resulting from

legislative or regulatory changes. These factors that affect the number of initial protests should be entirely external to the protest process. Therefore, initial protests may actually be a better measure of system demand than the aggregate total and may provide a more accurate indication of a change in protestor activity.

One significant secondary determinant of the contractor expectation factor is the contractor's perception of his potential for successful remedy. Contractors presumably base their decision to protest on a business judgment of the likelihood of success, the cost to protest, and the time needed to protest. Pro forma protests which have only cathartic value reflect bad business decisions that will be rare events and can be discounted in terms of significant numbers of inputs. One of the presumptions of CICA must have been that contractor expectations would be raised by the new procedures.

Analysis of initial protest data duplicates the methods that were used for total protests. A trend analysis is provided in Table 6. By inspection, the data are erratic in size and direction. Various regression analyses were attempted as before to accommodate the transition year data problem mentioned previously. The preferred regression model uses actual annual totals but still has a poor correlation coefficient, 0.655. According to this model, the increase in FY 85 was 8.8% above

TABLE 6

ACTUAL INITIAL BID PROTESTS TRENDS

<u>Fiscal Year</u>	<u>Initial Bid Protests</u>	<u>Quantity Change</u>	<u>Percentage Change</u>
81	1,804	N/A	N/A
82	2,295	+491	+27.2
83	2,501	+206	+ 9.0
84	1,937	-564	-22.6
85	2,708	+771	+39.8
86	2,552	-156	- 5.8

ALTERNATIVE: EQUIVALENT ANNUAL INITIAL BID PROTEST TRENDS

84	1,937	-564	-22.6
85 (Pre-CICA)	3,250	+1,313	+67.8
85 (CICA)	2,484	-766 ¹	-23.6
86	2,552	+ 68	+ 2.7

Note:

¹FY 84 to FY 85-CICA Change: 28.2%

Source: Developed by Researcher

prediction and FY 86 actual values fell below expectation by 2.4%. The associated coefficient of determination is 0.4296, so the model is not reliable. A four quarter moving average forecast of actual annual totals shows an unexpected rise of 27% in FY 85 followed by another 8% increase in FY 86. The performance of the moving average model is fair. Efforts to develop an adequate exponential smoothing model

were unsuccessful. The large annual swings in opposite directions leads to a large cumulative deviation figure of merit.

Results are summarized in Table 7. It is the researcher's opinion that initial protests increased 27-35% above expectations in FY 85 and 2-3% above a reasonable forecast for FY 86. Comparing these ranges to the corresponding shifts in the total protests received, one concludes that the results are consistent with the fact that the majority of total protests are initial protests.

TABLE 7
CHANGES IN INITIAL PROTESTS

<u>Method</u>	<u>FY 85 Percentage Change</u>	<u>FY 86 Percentage Change</u>	<u>Comments</u>
Trend Analysis	+39.8	-5.8	Actual annual totals
Trend Analysis	+28.2	+2.7	FY 88 CICA Equivalent Annual Data
Regression Analysis	+ 8.8	-2.4	Poor model
Moving Average	+26.9	+8.1	Fair model
Exponential Smoothing	N/A	N/A	Inadequate
Summary Opinion	+ 27-35	+ 2-3	

Source: Developed by Researcher

(3) Requests for Reconsideration. Reconsideration requests, presented in Table 3, can be viewed as process feedback. Prior to CICA, reconsideration requests involved approximately 6% of total protests. They originate when cases are dismissed during development, when cases are summarily dismissed, or when cases are denied or sustained, i.e., a decision is rendered. Reconsideration requests should be dominated by factors internal to the bid protest process such as dismissal rates, denial rates, or sustain rates. Therefore, they should reflect process functioning largely to the exclusion of external influences such as protestor's willingness to protest.

The sole exception would be a major external change to the protest process such as that resulting from CICA. In that event, the changed system could be expected to create different feedback values. In fact, reconsideration requests doubled to approximately 12% after CICA. This shift indicates some fundamental process change. Further speculation is unwarranted absent additional data.

3. Secondary Data and Analysis

a. Issue Area Statistics

(1) Data. GAO introduced a profile of stated protest issues with their FY 85 report to Congress. The report noted these data were not readily available in the past but are instead a beneficial byproduct of a

computerized case tracking system introduced to help cope with a growing workload.

For the portion of FY 85 and all of FY 86 under CICA, GAO reported statistics for the issue areas addressed on the protestor initial statement [9:B1;10:12]. Although the actual data reflect percentages of protest cases closed rather than cases received, they are reported in Table 8 as more representative of process input characteristics than output measures.

TABLE 8

ISSUE AREAS CITED BY PROTESTORS FOR FULLY DEVELOPED CASES

ISSUE AREA	PERCENTAGES	
	<u>FY 85</u>	<u>FY 86</u>
Procurement was improperly sole source	2.5	2.6
Solicitation was defective	22.2	17.7
Protestor's offer was improperly rejected	24.2	26.3
Awardee's offer improperly accepted	12.1	16.4
Selection methodology was otherwise improper	5.0	5.8
Protestor says it was unjustifiably found to be not responsible	4.5	4.3
Protestor says awardee was not responsible	2.6	2.9
Protestor raises other issues or states no issue	26.9	24.0

Source: Compiled from references 9 and 10 by the Researcher

The lack of pre-CICA data obviates comparisons, however COGP did look at the causes of bid protests during their study. They analyzed 1050 bid protests from 15 agencies including protests to the contracting agency and to the GAO. COGP found 30% of the protests "challenged adequacy or legality of the IFB or the solicitation" [24:A-17]. Responsiveness of the awardee issues were raised in 29% of the cases. Bidder responsibility disputes affected another 13% and the balance of 28% of protests concerned other challenges including, "ambiguous or restrictive specifications, evaluation criteria, mistake in bid, and set aside procedures." These COGP data provide an useful baseline from which to assay CICA performance.

(2) Analysis of Issues Raised. GAO stated that the data:

. . . indicates that a large portion of FY 1985 CICA cases were filed by firms that. . . were complaining either of the rejection of their offer or of the acceptance of a competitor's offer. A significant number of complaints dealt with alleged solicitation defects. Only a few . . . sought to overturn improper sole-source awards, a result that is consistent with earlier GAO studies. [9:5]

In FY 86 GAO surmised that the ". . . issues relating to the selection of an awardee continue to predominate, while issues such as alleged improper use of noncompetitive procurement techniques appear relatively infrequently" [10:5].

Comparison of the COGP data and the post-CICA GAO experience is complicated because the COGP data

categories do not correlate well. The GAO issue categories for improper sole source and complaints that the bidder's offer was improperly accepted could be allocated to either of two COGP pool categories.

At face value, only two COGP pools can be matched to GAO data. COGP found that the responsiveness of another bid or offer was at issue 29% of the time; GAO found the complaint that the awardee's offer was improperly accepted 12-16.4%. The second match occurs in challenges of the responsibility of the awardee: COGP found 13% while GAO found only 2.6-2.9%. But the obvious conclusion that percentage of protests challenging awardee competence or proposals has fallen is suspect for two reasons. First, COGP considered contracting agency protests as well as the GAO appeals, and second COGP data may well reflect percentages of protests received, whereas GAO addresses cases closed. Given the irreconcilable differences, it is difficult to impute what changes, if any, have actually occurred.

One conclusion is possible from the GAO data at hand. If protestors are stating their true motivation and only a few protestors (2.5%) are complaining of improper sole source awards, the data indicate that the bid protest process is seldom used to compel greater competition. There should be no reason for protestors to disguise the reason for a good-faith protest; in fact, they

risk rejection of their complaint if no reason or an invalid reason is stated. Therefore, it can be assumed that reasons stated by protestors are real.

If the intent of incorporating of bid protest reform legislation as part of CICA was to use the bid protest process to enforce CICA, the resultant effect has been marginal at best and the legislation has failed.

An alternative hypothesis would be that CICA provided a vehicle to which bid protest reform legislation could be appended. The practice of combining unrelated legislation is common in the U.S. Congress, especially where the dominant legislation has strong appeal and the "rider" legislation has a only a small constituency or is otherwise so neutral that separate passage is unlikely. The alternative hypothesis would likely not incur any significant increase in protests to enforce competition.

Recalling that these data are related to the total number of protests received, one might reasonably question whether the ratios hold uniformly throughout the process, e.g., of those cases in which a protest is sustained, what is the issue raised?

b. Contract Method Statistics

(1) Data. Other GAO statistics track whether a sealed bid or competitive proposals contract method was associated with a protest. The GAO data are limited to

protests in which a decision was rendered.¹ Notwithstanding the limitation, the statistic is an input measure characteristic and is therefore reported in this section. These data are summarized in Table 9.

The reader might expect the sum of sealed bid and competitive proposals methods figures to equal the number of protests. The small differences reflect protests of small purchases, scheduled procurements and other, seldom-used contract methods.

GAO does not make any distinction between full and open competition and other than full and open competition in competitively negotiated cases. Consequently, it is not possible to contrast competitive and noncompetitive award protest experience.

(2) Analysis. The percentage of formal advertisements protested averaged 58.55% (with a standard deviation of 5.91%) for the period FY 76-86. The percentage of competitive negotiations averaged 41.15% (with a standard deviation of 5.28). The tight variances reflect stability over the time period involved. Until FY 86, more formal advertisements were protested than negotiations. In FY 86, the numbers were nearly equal, but negotiations led slightly for the first time.

¹The reader should recall that sealed bid method is the post-CICA term for advertised procurement and the term competitive proposals includes earlier negotiated procurement.

TABLE 9

BID PROTEST DECISIONS BY CONTRACT METHOD
(FISCAL YEAR)

	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	Post 1985	1986
PROTESTS DECIDED	978	820	894	857	876	1,007	1,091	1,377	1,261	576	437	1,095
- Sealed Bid Percentage	631 64.5	469 57.2	567 63.4	428 49.9	411 46.9	504 50.1	702 64.3	795 72.9	671 53.2	316 34.9	252 57.7	542 49.5
- Competitive Negotiations Percentage	347 35.5	351 42.8	327 36.6	333 38.8	366 41.8	392 38.9	389 35.7	446	445 35.2	244 42.4	184 42.1	553 50.5
Ratio of Sealed Bid to Competitive Negotiations	1.818	1.336	1.734	1.285	1.123	1.286	1.805	1.783	1.308	1.295	1.913	0.98

Source: Compiled by Researcher [7]

No conclusions are evident from this data, beyond a guess that the shift in emphasis contained in CICA that affords competitive negotiation equal favor with sealed bidding may have shifted some marginal contracts from one method to another and that these marginal solicitations were the ones drawing protests.

4. Measures of Bid Protest Process Transformation Function

If one considers the GAO bid protest process as an unspecified relationship of observable inputs and outputs, the input and output characterize a process transformation function that can be measured and analyzed. Two classes of measures exist: one type is the time aspects of the process; a second type concerns the output to input ratio or efficiency.

a. Case Processing Time Measures

Case processing procedure has not changed as a result of CICA. After a protest is received, GAO notifies the agency and an agency response is prepared. When GAO gets the agency package, they may hold hearings with the protestor or may simply proceed to a decision. To the extent that a protestor has knowledge of what is in the agency package, he may be permitted access and be allowed to submit a response. What CICA changed was the time allowed to notify the agency (1 day); the time allowed for agency response (25 days) and the total time for resolution (90 days).

Case processing time was one aspect of the GAO process that COGP criticized in 1972. The COGP source data provide an interesting baseline from which to compare CICA performance. Average processing time in days as reported by COGP are as follows:

<u>Year</u>	<u>Ave. Agency Resp. Time</u>	<u>Ave. GAO Proc. Time</u>	<u>Total Processing Time</u>
1968	46.5	33.3	87.3
1969	46.9	38.3	92.3
1970	45.4	42.3	90.5

For the same period, Department of the Navy cases were processed in 46.7 days at the agency, 38.8 at GAO, and a total average processing time of 91.5 days [24].

Subsequent to COGP, GAO tracked and reported case processing time for bid protests to "minimize the disruption to government procurement due to delay while protest are decided" [10:11]. Processing time is measured using four statistics:

- average disposition time--all cases;
- average contracting agency time;
- average protest disposition time; and
- average developed protest disposition time.

For the years FY 81 through FY 84, GAO also reported the following average time measures:

- GAO time (for protest disposition);
- GAO time (for developed protests disposition);
- agency time (for developed protests disposition);
- other time (for developed protests disposition);

- time for total protest withdrawn; and,
- time for total protests closed without decision.

Contracting agency time is the average time, in Federal Government working days, required by agencies to file reports with GAO. Protest disposition time reflects the average elapsed time (again, in Federal Government working days) from filing to closing. It does not include reconsideration request times. Developed protest disposition time is the average number of Government working days from filing to decision for initial protests decided on merits. Finally, disposition time for all cases reflects the average number of Government working days from filing to decision for both initial protests and reconsideration requests. These values are presented in Table 10.

It requires no elegant calculations to observe that the average time for agency response changed very little from the early 1970 performance that COGP observed until CICA, when a dramatic drop to a number slightly less than the CICA mandated requirement occurred. GAO processing time varied somewhat over the years but has held close to a forty-day period. Little change is observable with CICA. The shift in agency response time accounts for nearly all of the observable shift in developed protest disposition time, but average disposition time has fallen further still. The additional favorable reduction is due to the fact that

TABLE 10

GAO BID PROTESTS CASE PROCESSING TIMES
(in Federal Government Working Days)

	Fiscal Year										Post
	1978	1979	1980	1981	1982	1983	1984	1985	1985	1986	
DISPOSITION TIME---											
ALL PROTESTS	69.5	N/A	73.8	80.1	84.0	89.6	84.3	80.6	22.1	31.7	
-Agency Time	44.2	N/A	42.0	52.6	41.9	43.8	44.4	45.2	N/A	N/A	
-GAO Time	25.3	N/A	31.8	27.5	42.1	45.8	39.9	N/A	N/A	N/A	
DEVELOPED CASES											
DISPOSITION TIME				134.6	128.4	132.0	123.3	121.6	61.1	65.9	
-Agency				46.4	41.2	44.3	41.6	N/A	21.9	23.2	
-GAO				43.7	60.8	63.6	52.4	N/A	N/A	N/A	

Source: Compiled by Researcher [7]

summary decisions are delivered earlier than in pre-CICA days. The CICA power granted to GAO to dismiss immediately cases that lack merit on their face results in significant time savings by avoiding full development. Since a large number of cases are handled in this manner, the effect on the average is significant.

GAO is justifiably proud of the fact that no protest has required more than the 90 days stipulated in the Act [9,10]. Case processing time is one statistic that has changed unambiguously in consequence to CICA. The improvement is nearly one-half the time required before CICA. The shortened time period is inherently more fair, and it also permits more effective remedies.

b. Measures of Filing Status

A second set of time measures are titled "filing status." GAO regularly collects data concerning when contract award occurs relative to each associated protest. Three measures are used:

- protests received and closed before award;
- protests received and closed after award; and,
- protest received before award and closed after award.

Although pre-CICA reports present raw numbers, the values reported in Table 11 are percentages that have been calculated. Subcategories for each statistic provide Defense and civilian agency components.

TABLE 11

CASE DISTRIBUTION BY FILING STATUS

	1976	1977	1978	1979	1980	1981	1982	1983	1984	Pre 1985	Post 1985	1986
PERCENTAGE CASES RECEIVED AND DECIDED BEFORE AWARD	36.4	43.1	29.2	37.5	37.4	31.6	37.2	41.7	34.0	35.3	55.5	48.9
-DOD	N/A	N/A	N/A	N/A	N/A	20.2	24.5	28.8	21.2	25.0	40.4	36.0
-Civilian Agencies						11.4	12.7	12.8	12.8	10.3	15.1	12.9
PERCENTAGE CASES RECEIVED AND DECIDED AFTER AWARD	47.9	44.1	67.2	53.2	53.0	55.3	50.9	48.1	52.0	52.0	2.5	48.1
-DOD						30.2	30.4	27.6	29.4	29.7	1.8	31.5
-Civilian Agencies	N/A	N/A	N/A	N/A	N/A	24.9	20.4	20.5	22.6	22.3	0.7	16.6
PERCENTAGE CASES RECEIVED BEFORE AND DECIDED AFTER AWARD	15.7	12.8	3.6	9.3	9.6	13.1	11.9	10.2	14.0	12.7	42.0	2.9
-DOD	N/A	N/A	N/A	N/A	N/A	6.8	6.8	5.0	7.4	5.3	29.3	2.1
-Civilian Agencies						6.3	5.1	5.2	6.6	7.4	12.7	0.8

Source: Compiled by Researcher [7]

Prior to CICA, an average 36.5% of cases were received and closed before award; 52.4% were received and closed after award; and 11.1% were received before but closed after award. No discernible trends in the year to year experience existed. In roughly 63% of cases, no protest decision was rendered until after contract award.

CICA specifically set out to correct the post award decision problem. After CICA, the received before but closed after award average fell to 2.7%. This change reflects the impact of the automatic stay provision of CICA that makes such an event less likely.

The percentage of protests received after award still remains in the 50% range. Cases received before award that now incur the stay of award have migrated to the decided before award category.

The conclusions are clearly that the stay feature is functioning since more cases filed before award are being resolved before award, but that no shift in protestor behavior leading to earlier protests has accompanied the change.

c. Transformation Efficiency

Output to input ratios are usually referred to as process efficiency. Arguably, they can be considered output statistics.

When a protest is lodged with GAO there are several alternatives of what might occur next. A large

number of protests are withdrawn and many more are "filtered" so that they never reach the decision step. Filtering can occur in situations where GAO closes the case without decision. If the contracting agency cancels the protested solicitation, GAO may dismiss the protest as academic. A number of cases are also rejected for reasons such as jurisdiction matters, untimely protest, or a protest not conforming to GAO procedures. Thus, it makes sense to look at the ratio of cases culled out and at how many reach the full development step.

If the protest survives the filtering, three outcomes are possible. GAO may find for the protestor and sustain the protest; it may find for the Government and deny the protest; or it may dismiss the protest as not meriting further hearing. To complicate matters, GAO can mix these decisions in almost any fashion.

The statistic used by GAO for many years has been the ratio of sustained to developed cases. This statistic is the clearest measure of protestor success. GAO started reporting sustained to developed case ratios in FY 81 as part of detailed agency statistics. The values reported for all agencies have ranged from 11.2% to 18.7% with an average of 15.2%. Although post-CICA FY 85 was very high, FY 86 fell to 13.8% and no discernable difference exists in the before and after CICA data. (For comparison,

Department of the Navy experience for the same period ranged from 7.9% to 17.0% with an average of 13%.)

Recently, GAO has introduced the protestor effectiveness rate to adjust the sustained to developed ratio for protests that actually achieve protestor satisfaction but are withdrawn or dismissed as academic before reaching the fully developed step. In GAO words:

The protestor effectiveness rate is calculated by projecting the total number of cases closed (through withdrawal of as academic) due to voluntary agency corrective action, by adding protests sustained and by dividing the sum by the number of cases filed. The result is then expressed as a percentage. . . . The results reported do not include cases where protests were abandoned as a result of actions taken by the contracting agency; moreover, the rates are based on the number of protests closed and not the number of procurements affected. More than 10 per cent of all procurements protested are subject to multiple protests, often with the protestors seeking incompatible forms of relief. Consideration of these factors would add to the totals reported. [9:F1]

GAO protestor effectiveness rates were reported for only the post-CICA periods: all agencies averaged 14.8% in FY 85 and 24.3% in FY 86. However, the post-CICA data contained in the GAO annual reports are not auditable and appear to be overstated. Attempts to retrospectively calculate these rates using GAO data to verify reported protestor effectiveness rates failed. For example, the calculated values for FY 85 and FY 86 are 15.3% and 17.4%. Furthermore, the component data needed to calculate pre-CICA values are not reported, so comparisons of pre- and post-CICA performance are not possible.

5. Measures of Bid Protest Process Output

a. Bid Protests Closed

The number of cases closed each fiscal year is the general measure of output activity. Because of the time lag between protest or reconsideration request and final disposition, a number of cases are in process at the close of each fiscal year. Thus, the total of protests decided does not match the total of protests received in any given year. However, over the long term all cases will be closed in some fashion or other, so the real output rate is 100% of all input cases.

In the same way that cases received can be subdivided, the cases closed statistic comprises initial protests and reconsideration requests. Initial protests are the lion's share, averaging 92.5% of cases closed. These data are provided in Table 12.

Bid protests closed represent the total workload accomplished by the GAO Office of General Counsel staff for each year. However, as will be seen, the amount of effort involved in closing these cases varies widely. The measure portrays only that, over time every protest filed with GAO will be closed by one of several ways; it has limited usefulness to this research.

b. Disposition of Cases Closed

Initial protests can be closed by: 1) withdrawal, 2) decision, or 3) without a decision. Table 13

TABLE 12

GAO BID PROTESTS CLOSED

	Fiscal Year											CICA	
	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1985	1986
CASES CLOSED	1,785	1,664	1,556	1,463	1,651	1,888	2,359	2,425	2,146	995	1,631	2,884	
-INITIAL													
PROTESTS	1,693 ¹	1,580 ¹	1,469 ¹	1,372	1,562	1,766	2,141	2,253	1,979	946	1,424	2,520	
PERCENTAGE	94.8	95.0	94.4	93.8	94.6	93.5	90.8	92.9	92.2	95.1	87.3	87.4	
-RECONSIDERATION													
REQUESTS	92 ²	84 ²	87 ²	91 ²	84 ²	95	167	138	134	49	207	364	
PERCENTAGE	N/A	N/A	N/A	N/A	N/A	5.0	7.1	5.7	6.2	4.9	12.7	12.6	

¹Estimated Value

²Bequests Closed; Smaller than Unknown No. of Requests Received

Source: Compiled by Researcher [7]

TABLE 13

PROTEST DISPOSITION

Fiscal Year

	1976	1977	1978	1979	1980	1981	1982	1983	1984	Pre 1985	Post 1985	1986
INITIAL PROTESTS CLOSED	1,785	1,664	1,556	1,463	1,651	1,766	2,141	2,253	1,979	946	1,424	2,520
-Withdrawals	507	435	425	391	462	502	588	579	493	191	236	536
-Percentage	28.4	26.1	27.3	26.7	28.0	28.4	27.5	25.7	24.9	20.2	16.5	21.3
-Decision	978	820	894	857	876	896	1,091	1,241	1,124	427	230	731
-Percentage	24.8	49.3	57.5	58.6	53.1	50.7	51.0	55.1	56.8	45.1	16.2	24.0
-Non decision	300	409	237	215	313	368	462	433	362	328	958	1,253
-Percentage	16.8	24.6	15.2	14.7	19.0	20.8	21.6	14.2	18.3	34.7	67.3	49.7
REQUESTS FOR RECONSIDERATION	92	84	87	91	89	95	167	138	134	49	207	364
-Decision	N/A	N/A	N/A	N/A	N/A	94	133	112	121	N/A	N/A	313
-Percentage						99.0	79.6	86.1	90.3			86.0
-No decision	N/A	N/A	N/A	N/A	N/A	1	34	26	13	N/A	N/A	51
-Percentage						1.0	20.4	18.9	9.7			14.0

Source: Developed by Researcher using various citations [7]

provides data showing the number of initial protests closed by each of these methods for the period FY 76 to FY 86. By inspection, it is evident that the percentage of withdrawals has remained stable at approximately 20 to 25% before and after CICA. The percentage of cases decided has fallen since CICA from a stable 50-55% range to 30%, while percentage of non-decisions rose from 20-25% to 50%. The change and the reasons for it will be discussed further below.

(1) Withdrawals. Withdrawals are a significant fraction of the total number of protests filed; between FY 76 and FY 86 withdrawals averaged 25% of initial protests closed. Withdrawal action can occur at any time in the decision process and can be for either a known or unknown reason. Available data are provided in Table 14. For those limited years in which withdrawal reasons have been reported, approximately two-thirds are for a known reason and roughly one-half are due to agency corrective action. No discernible difference is evident before and after CICA.

(2) Protest Decisions. Many cases are closed by decision, including summary decisions and decisions on the merits. Over the period FY 76 to FY 86, an average of 53.2% of initial protests closed have been decided, as shown in Table 13.

The decision process follows published GAO procedures. GAO notifies the affected contracting agency at

TABLE 14
DISPOSITION OF WITHDRAWALS

<u>Fiscal Year</u>	<u>83</u>	<u>84</u>	<u>85</u>	<u>85 CICA</u>	<u>86</u>
Total Withdrawals	579	493	191	236	536
Reason Known	N/A	318	N/A	172	328
Percentage	N/A	64.5	N/A	72.9	61.2
Reason Unknown	N/A	175	N/A	64	208
Percentage	N/A	35.5	N/A	27.1	38.8
Corrective Action	N/A	230	N/A	141	273
Percentage	N/A	46.7	N/A	59.7	50.9

Source: Compiled by Researcher [7]

the time the protest is received, the agency prepares a report, the protestor submits comments and conferences are held as appropriate. Based on the "fully developed" record, a decision is rendered: the protest is either sustained, denied, or dismissed. In some instances where multiple issues are involved in the protest, a mixture of decisions can result including; denial in part and dismissal in part, sustain in part and dismissal in part, denial in part and sustain in part, and denial in part, sustain in part, and dismissal in part. Mixed decisions introduce an unwelcome complexity to the statistics.

The subject of sustained decisions as a fraction of cases developed was discussed, supra, under the

topic of process transformation measures. Dismissals however, deserve further discussion. Dismissals can occur after the agency submits its report which is termed partial development, or after the full record has been obtained, termed full development. GAO addressed the topic in the FY 86 report:

A significant number of protests raise issues that are clearly without merit on their face, that concern matters that are appropriate for handling by GAO under its bid protest function, or that are not timely raised or otherwise do not conform to the bid protest regulations. Such issues are dismissed: (1) by decision after full development in cases where the facts are not apparent until a complete record is made or where other issues raised are suitable for decision on their merits, (2) by summary decision, where full development is not required but an explanation tailored to the specific facts of a case is required to explain the decision, and (3) by notice decision. Notice decisions are machine generated standardized form notices that have been developed for use in a variety of standard situations. [10:16]

Summary decisions are:

. . . issued on the basis of the initial record made by the protestor in cases where a report was not requested from the contracting activity or where such a report was requested but it was possible to issue a decision before the report was received. [7:39:39]

These summary decisions were considered dismissals. Consequently, before CICA all dismissals--whether summary decisions or decision on the merits of fully developed cases--were scored as dismissals and cases decisions.

Prior to CICA, the notice decision alternative did not exist. With the enactment of CICA, the Comptroller General gained tacit authorization "to dismiss any protest determined to be frivolous or which, on its

face, does not state a valid basis for protest" {31 U.S.C. 3554 (a)(2)}. This authority basically recognizes the way GAO handled non-decisions prior to CICA, but by making it explicit, GAO is able to dismiss many protests earlier in the process thus eliminating wasted effort. By way of implementing this authority, GAO established a new class of outcome called notice decisions. Concurrent with CICA, GAO installed a computerized case tracking system that was able to produce the form notices. GAO calls this feature "speedy dismissal."

Subsequent to CICA, all summary decision and notice decision dismissals have been moved to the category "closed without decision." This bookkeeping shift alone accounts for the changes subsequent to CICA in the percentage of cases decided and percentage of cases closed without a decision.

Disposition decision data are provided in Table 15.

By inspection, the number and percentage of summary decisions have risen drastically since CICA. The number of cases decided on the merits has been relatively flat, but the corresponding percentage has fallen with the increase in total initial protests decided. If dismissals were reallocated to decisions in the FY 86 data, the percentage of non-decisions would fall to 21.8 and percentage of cases decided would climb to 56.9, which

DISPOSITION OF CASES DECIDED

	Fiscal Year						
	1980	1981	1982	1983	1984	Pre 1985	CICA 1985 1986
TOTAL INITIAL PROTESTS DECIDED	N/A	896	1,091	1,241	1,124	(755) * (1,154) *	(2,032) *
SUMMARY DECISIONS							
-Notice Decisions	277	296	439	476	469	328	924
		33.0	40.2	38.3	41.7	43.4	80.1
							594-702
							63.8
DECISIONS ON MERIT							
-Percentage	N/A	600	652	765	655	427	230
		67.0	59.8	61.6	58.3	56.6	19.9
							736
							36.2
DENIED							
Percentage	356	391	451	565	502	364	187
		63.2	69.2	73.9	76.6	85.2	81.3
							630
							86.2
SUSTAINED							
Percentage	61	90	83	62	70	63	43
		15.0	12.7	8.1	10.7	14.8	18.7
							101
							13.7
MIXED							
Percentage	N/A	119	118	138	83	N/A	N/A
		19.8	18.1	18.0	12.7		

*Calculated Value

Source: Compiled by Researcher, various citations [7]

closely parallels the pre-CICA averages. Thus, it can be concluded that the number of cases decided on the merits has not shifted as a result of CICA.

One interesting observation of the disposition data is the fact that the percentage of cases sustained may have risen slightly in the post-CICA reporting periods.

(3) Protests Closed Without a Decision. A significant percentage of cases are closed without a decision, as is shown in Table 13. On average, 20.5% of initial protests closed before CICA were concluded in this fashion.

Closing a case without decision prior to CICA involved ending it "without action" or by "nondecision letter." Nondecision letters were issued to the protestor where GAO encountered unusual circumstances [11]. A common situation resulting in this end involved a contracting agency action that rendered a protest decision meaningless or "academic." The agency could terminate the solicitation or might make contract award to the protestor who lodged the protest prior to award. Absent a formal withdrawal by the protestor, GAO would close the case by letter. As stated above, this category now includes all notice decisions and summary decisions, i.e., dismissals.

Part of the flood of post-CICA data reporting includes statistical analysis of the reasons for

dismissals: by notice decision, by summary decision, and after full development. This information is presented in Tables 16, 17, and 18, respectively. Since pre-CICA comparison data are unavailable, evaluation of the impact of CICA is meaningless.

(4) Reconsideration Requests. Reconsideration requests can be closed by another formal decision or without decision. The formal decision can either reverse or uphold the original decision. As the data in Table 19 show, only a very few cases achieve a reversal. The only change apparent with CICA is that most cases are being closed by formal decision rather than without decision. This may also be due to the computerized notice generation capability in the post-CICA environment.

c. Contract Stays and Terminations

(1) Award Suspension Data. In the report for FY 86 bid protest activity, GAO introduced data "regarding the relative frequency of award in the face of protest" [10:13]. No similar data were presented for the part of FY 85 affected by CICA and award suspensions were not required prior to CICA. In FY 86, defense agencies awarded contracts in 5.5% of the cases where the initial protest was received before award. During the same period civilian agencies awarded 5.9% of the time. The combined percentage totals 5.6% [9,10].

TABLE 16
BASES FOR NOTICE DISMISSALS

<u>Bases</u>	<u>1985 Percent</u>	<u>1986 Percent</u>
Abandoned cases	22.6	27.9
No basis of protest was stated	13.7	10.1
Protest was not filed within 10 working days after basis was known	5.6	9.3
Protest concerning the citation was filed after opening date	7.1	8.9
Protester challenged affirmative determination of responsibility	5.8	8.7
Protest raised issues that SBA decides	9.0	6.4
Protester failed to furnish copy of protest to contracting agency	13.1	6.3
Agency level protest was not timely protested to GAO	4.6	6.3
Issue protested was matter of contract administration	4.8	5.7
Protester was not an interested party as defined by CICA	4.2	3.3
Protest concerned wage rate matters for review by Department of Labor	2.2	1.4
Protest raised issues that were outside GAO's CICA jurisdiction	4.2	2.4
Protest was otherwise not for GAO's consideration	2.4	3.3

TABLE 17

BASES FOR SUMMARY DECISIONS

<u>Bases</u>	<u>Percent</u>
Academic ^a	4.5
Responsibility	10.4
Litigation	2.1
Jurisdictional defect	16.2
SBA issues	7.1
Subcontractor	1.0
Untimely	25.3
Misc. (other)	33.4

^aprotest raises an issue that is of only theoretical interest, not an issue of practical importance to the procurement protested.

(2) Performance Suspension Data. As was the case for award suspension data, suspension of performance when a bid protest is lodged after award is a CICA provision. GAO did not report statistics for the part of FY 85 affected. FY 86 data for cases where the agency invoked the statutory procedure to permit continued performance in the face of the protest are summarized in Table 20.

d. GAO Recommendations

Prior to CICA, GAO provided numbers of cases in which corrective action was recommended and the number of cases where contract cancellation or termination was recommended. These data have been discontinued in the

TABLE 18

BASES FOR DISMISSAL AFTER FULL DEVELOPMENT

<u>Bases</u>	<u>Percent</u>
Responsibility ^a	7.67
Litigation ^b	1.67
Jurisdictional defect ^c	11.00
SBA issues ^d	4.33
Subcontractor ^e	0.67
Untimely ^f	45.33
Misc. (other)	29.33

^aIssue concerns a firm's (other than the protester's) capability to perform if awarded a contract. GAO will consider questions relating to whether a firm has obligated itself to perform, but does not normally consider allegations that an agency should disqualify an offeror because of concern that it may not meet its obligations.

^bGAO will not consider a protest where the matter is pending before a court of competent jurisdiction, unless the court expresses an interest in GAO's decision.

^cConcerns issues falling outside GAO's bid protest jurisdiction as defined by CICA, 31 U.S.C. § 3551, et seq.

^dGAO does not consider issues which by law fall within the exclusive jurisdiction of the Small Business Administration.

^eProtests filed by potential subcontractors are normally not for consideration by GAO under CICA.

^fConcerns issues that have not been protested within the time limits set by GAO's Bid Protest Regulations.

TABLE 19
RECONSIDERATION DISPOSITIONS

Fiscal Year	81	82	83	84	85	85CICA	86
Decisions reversed	6	3	2	3	1	4	8
Decisions not reversed	88	130	110	118	N/A	N/A	305
Not decided	1	34	26	13	48	203	51

TABLE 20
CONTINUED PERFORMANCE IN FACE OF PROTEST

<u>Protests Rec'd after Award</u>	<u>Defense Agencies</u>	<u>Civilian Agencies</u>	<u>Combined Agencies</u>
Where agency determined that urgency justified continued performance	16	14	30
Where agency found that continued performance was in the Government's best interest	7	13	20
Continued Performance in Face of Protest (Sustain Data)			
Where agency determined that urgency justified continued performance	3	2	5
Where agency found that continued performance was in the Government's best interest	1	3	4

post-CICA reports without explanation. The omission is serious from the point of view of the research since no comparisons are possible.

One of the provisions of CICA previously described requires that GAO submit an annual report to Congress of all situations in which the contracting agency fails to implement the GAO recommendation. Three cases have been reported to date: two in FY 85 and one in FY 86. It is of passing interest that two of the three have been Department of the Navy actions, but is otherwise not relevant to the topic.

6. Department of the Navy Data

Greater levels of detail are available as a result of the GAO automated bid protest tracking system implemented concurrent with CICA. For FY 86 GAO provided detailed tabulated breakdown data on a "reporting activity basis tied to agencies' GAO contact points for receipt of protests and report filing purposes" [10:21]. Department of the Navy data are provided in Table 21. These data will prove to be a useful link to the next chapter.

D. SUMMARY

The GAO bid protest process receives an input of nearly 3000 protests annually; approximately 92.5% of each year's protests are new. Although the number of protests varies widely each year, over the long term it has continued to grow at a rate of 115 per year. Roughly one-half of the protests involved sealed bid method contracts, while the other half are protests of competitive negotiations. Surprisingly few protests--about 2.5%--address lack of

TABLE 21

DEPARTMENT OF THE NAVY DATA

Activity	Rpt Days	Total Cases	Av. Days	Merit Dec.	Merit Days	WD	AC	Prot. Sus.	% Sus.	Eff. Rate
Military Sealift										
Command	25.0	19	26.2	5	70.6	6	0	0	0.0%	15.8%
Naval Aviation										
Logistics Center	23.3	15	43.5	10	54.6	1	0	2	20.0%	13.3%
NAVAIR	24.3	6	23.7	3	46.7	0	0	0	0.0%	0.0%
NAVELEX	18.0	8	25.4	1	77.0	3	1	0	0.0%	18.8%
NAVFAC	23.3	131	29.0	37	59.7	18	6	6	16.2%	18.3%
NAVSEA	23.0	50	37.2	17	71.1	16	1	4	23.5%	36.8%
Navy Strategic										
Systems Program	20.5	3	45.7	2	55.0	0	0	0	0.0%	0.0%
NAVSUP	23.9	245	27.0	50	65.5	87	9	6	12.0%	38.1%
Navy Engineering										
Logistics Office	0.0	5	11.8	0	0.0	2	0	0	---	40.0%
National Naval										
Medical Center	0.0	1	0.0	0	0.0	0	0	0	---	0.0%
Office of Naval										
Research	25.0	4	46.3	1	58.0	0	1	0	0.0%	0.0%
Total:	23.5	487	29.1	126	63.3	133	18	18	14.3%	29.6%

competition i.e., sole source issues; the majority are complaints that the protestor was treated unfairly or that the awardee received favored treatment.

CICA seems to have caused an approximate 10-15% increase in the total and initial numbers of protests received over the long haul; reconsideration requests also doubled. But a pronounced jump in these measures in FY 85 seems to be an anomaly related to other factors as well as CICA--possibly the shift from DAR and FPR to FAR that coincided. The balance of sealed bid to competitive negotiations shifted to slightly in favor of competitive negotiations with CICA. To the extent that Congress intended that the bid protest process be used to enforce competition, the legislation has failed; there is no major increase in protests and no increase in the number of sole source contracts cited in protests.

Where CICA has had a decided effect is process time. COGP cited the 90 days required in 1970 as unsatisfactory; by 1984 this had grown to an average of 123.3 days for developed cases. Since CICA, no case has taken more than 90 days and average time for all protests is now only 31.3 days; developed cases require 65.9 days on average. The improvements can be attributed almost entirely to contracting agency compliance with the mandated 25 days for response to GAO and the new GAO power to dismiss unmeritorious cases in a speedy manner.

Statistics that reflect time of decision and time of filing show that more cases are being decided prior to award; therefore, the assumption must be that protestors are no longer precluded for fair remedies by late decisions on the average. Still, protestor behavior remains unchanged regarding the time of filing; in half the cases no protest was filed until after award. To the extent that protestors have gained better access to all possible remedies, the process is improved.

Protestor effectiveness has not improved in terms of the ratio of sustained to developed cases; GAO has introduced a new statistic intended to demonstrate an obvious fact that protestors are gaining their desired goals in a greater number of cases but the measure is ambiguous.

In terms of changes in the protest process output, the fact that nearly 25% of initial protests are withdrawn before decision has not changed with CICA. It is clear that roughly one-half of those withdrawals are related to agency actions that make the protest effective. Combining the two averages means that nearly 12.5% of initial protests filed result in agency action that satisfied the protestor. One-third of the withdrawals are for unknown reasons. Some proportion of these must also be protestor successes.

Meanwhile, approximately 15% of the average 53% of initial protests closed by decision result in sustained decisions. Stated differently, approximately 7.5% of

initial protests are decided in favor of the protestor. The percentage sustained may have increased with CICA, but if so, the change is marginal. The number of cases closed without decision has not changed significantly, but bookkeeping alterations cloud that fact.

Combining the success rate related to withdrawals and that related to sustained decisions indicates that protestors are successful no less than 20% of the time. This percentage is understated by the withdrawals that are recorded as withdrawn for unknown reasons which relate to protestor success plus any dismissals that might be successes. The reasons for dismissal given in the FY 86 GAO report tend to minimize the importance of dismissals, however. Furthermore, as GAO observed, multiple protests filed on the same contract or solicitation can dilute the percentage as well.

One of the disappointments of the research is that so little data are available regarding the protest stay and termination features. To the extent that the filing status measures show that fewer protests are being decided after award, it can be assumed that the features are effective. Beyond that inference, all other observations from the GAO data are speculation.

Thus, several of the original research questions have been addressed in this Chapter on GAO bid protest process performance, including queries regarding what the GAO bid

protest process is and how it has changed; what the principal management control measures are, and the extent to which the stay and termination provisions have been exercised. Some answers have been more complete than others.

V. NAVY FIELD ACTIVITY DATA AND ANALYSIS

A. INTRODUCTION

This Chapter addresses data collection and analysis from selected Navy Field Contracting activities. Five organizations were targeted: Navy Aviation Supply Office (ASO), Navy Ships Parts Control Center (SPCC), Navy Regional Contracting Center (NRCC) Philadelphia, NRCC Long Beach, and NRCC Washington, DC. As mentioned in Chapter II, these activities were chosen with the expectation that their broad range of contract actions and large business volume would impart significance.

Section B of this Chapter addresses the content and analysis of data collected relating to the enumerated field activities' post-CICA protest activity. Section C addresses an effort to correlate this data with contract action reporting information reports. Section D explores the results of personnel interviews conducted with individuals at the five activities. Finally, Section E is a summary.

B. FIELD ACTIVITY BID PROTEST DATA

Data requests were mailed to selected individuals in each of the five field activities involved. The list of data sought appears in Table 22. Additionally, a request was also submitted to the parent activity, the Naval Supply Systems Command. The following sections address the data

TABLE 22
DATA REQUEST

TOTAL NUMBER CONTRACT ACTIONS
 NO. FORMALLY ADVERTISED/SEALED BID
 NO. NEGOTIATED/COMPETITIVE PROPOSALS

TOTAL NUMBER OF CONTRACTING OFFICER PROTESTS RECEIVED
 NO. FORMAL ADVERTISED/SEALED BID
 NO. NEGOTIATED/COMPETITIVE PROPOSALS
 BREAKOUT BY CONTRACT FOR GOODS OR SERVICES
 COMMODITY AREA

TOTAL NUMBER OF GAO BID PROTESTS RECEIVED
 NO. FORMALLY ADVERTISED/SEALED BID
 NO. NEGOTIATED
 BREAKOUT BY CONTRACT FOR GOODS OR SERVICES
 COMMODITY AREA
 NO. CASES PREPARED
 RESPONSE TIME TO GAO
 CASES ACTUALLY DECIDED
 GAO CASE NO.
 NO. DISMISSED
 NO. DENIED
 NO. SUSTAINED
 PREPARATION COSTS
 CONTRACT STAY DELAY

OF CASES SUSTAINED:
 RECOMMENDATIONS
 TERMINATION
 COSTS

RECOMMENDATION COMPLIED/NOT COMPLIED WITH

Source: Developed by Researcher

obtained in response to the query. As will become evident, the data are not conclusive, but taken together they provide an interesting picture.

1. Department of the Navy Bid Protests to GAO

As was discussed in Chapter IV.C.6, GAO began reporting greater detail for agency protests in its FY 86 report. The information reported about the Department of the Navy was presented in Table 21.

For FY 86 NAVSUP was involved in 245 of 487, or 50.3%, of Navy cases. NAVSUP total protests were nearly double those of the next largest activity, the Naval Facilities Engineering Command. This leadership position--while a dubious distinction for NAVSUP--broadly supports the decision to use NAVSUP as the bellwether Systems Command for this research.

To reiterate the contents of the report, according to GAO NAVSUP's FY 86 performance resulted in 87 withdrawals and 50 merit decisions. Six of the 50 decided cases were sustained for a 12% sustained to developed case ratio. GAO reported protestor effectiveness at 38.1%, however the accuracy of this figure cannot be confirmed with the data provided.

Concurrent with the implementation of CICA, the staff of the Secretary of the Navy established an interim requirement that reports called Bid Protest Action Reports (RCS DD-DDR&E(AR) 1669) be prepared and submitted at the conclusion of each GAO or GSBICA protest. At the time of writing, ASN staff were accumulating the reports and summary statistics but no higher level review was occurring.

Tables 23 and 24 provide draft summary statistics obtained from ASN,S&L for calendar years 1985 and 1986, respectively. These data reflect the number of Bid Protest Action Reports that had been received by ASN by April 1987. Data for 1986 were incomplete, due to reporting lags.

TABLE 23
GAO PROTESTS--CY 1985

<u>Navy Activity</u>	<u>Total</u>	<u>Sustained</u>
NAVAIR	26	3
NAVFAC	134	5
NAVSEA	31	1
NAVSUP	178	4
SPAWAR	1	0
USMC	14	2
MSC	20	2
ONR	3	0
ADSPO	2	0
SSPO	1	0

Source: ASN,S&L draft data

The obvious difference of calendar year rather than fiscal year totals complicates comparison. Other subtleties such as whether GAO and ASN accumulate their statistics on the basis of protest filing date, protest decision date, or Bid

TABLE 24
GAO PROTESTS--CY 1986

<u>Navy Activity</u>	<u>Total</u>	<u>Sustained</u>
NAVAIR	UNK	UNK
NAVFAC	56	1
NAVSEA	36	3
NAVSUP	45	1
JCMPO	2	0
SPAWAR	3	0
USMC	15	0
MSC	UNK	UNK
ONR	2	0

Source: ASN,S&L draft data

Protest Action Report date make correlation of the two data sets impossible at the summary level and extremely difficult at a case level. What can be stated is that the ASN summary data address over 400 protests of a total of 789 post-CICA Navy cases counted by GAO. The percentage is sufficient to trust the ASN data as a reasonable sample, although statistical significance would undoubtedly be weak.

Part of the disparity in total numbers is due to a lag in reporting by some activities, which probably results from a low level of attention. Since the Reports are not receiving high level scrutiny, they are not given much

emphasis. This indifference may be entirely appropriate since management of bid protest statistics is unrelated to avoiding or resolving protests.

The ASN data sample indicates that the Navy experienced sustained protests 22 times in 408 protests lodged, or at a rate of 5.4%. The comparable GAO rate is 3.0%, so the ASN data may be biased in favor of the more developed cases. NAVSUP experience is 5 sustained decisions in 223 cases, or a 2.2% rate. Since there are no indications of major discrepancies between the NAVSUP experience and the GAO figures, the assumption that the Reports are a reasonable sample is supported by the overall GAO data.

2. Bid Protest Action Reports

a. The Report Sample

With the assistance of ASN,S&L staff, 159 reports pertaining to the five activities were obtained. The profile by fiscal year and activity is provided as Table 25. As is apparent, the NAVSUP activities targeted represent a sizeable sample of the total population of reports, which is consistent with the theoretical approach taken for this research.

Only one of the five activities solicited for data provided these specific reports directly to the researcher. Two activities explicitly withheld the data as

TABLE 25
BID PROTEST ACTION REPORTS

<u>Activities</u>	Calendar Year			<u>Row Totals</u>	<u>Percentage Totals</u>
	<u>85</u>	<u>86</u>	<u>87</u> *		
ICP					
ASO	9	6	-	14	9.4
SPCC	20	25	2	47	29.6
NRCC					
Long Beach	14	16	-	30	18.9
Philadelphia	11	20	-	31	19.5
Washington, DC	<u>11</u>	<u>13</u>	<u>12</u>	<u>36</u>	22.6
Column Totals	65	80	14	159	

*Partial Year Data

• Source: ASN Bid Protest Action Reports; compiled by
Researcher

too preliminary. The inference is that one must be cautious in using the Reports.

The 159 reports obtained consist of 62 reports from the two ICPs and 97 reports from the three NRCCs. Specifically, there are 15 from ASO, 47 from SPCC, 30 from NRCC Long Beach, 31 from NRCC Philadelphia, and 36 from NRCC Washington.

It is not clear to what extent these reports reflect the total experience of the five activities. The total number from Long Beach agrees closely with the total number of protests that they identified to the researcher; slight variances can be accounted for by differences in

dating the reports and by lagging reporting to ASN. NRCC Philadelphia legal staff identified only nine protests of which all were included in the ASN data. ASO, SPCC AND NRCC Washington total figures were not available. The approximate equality among the three NRCCs seems to indicate that most, if not all, reports are in the ASN data. On the other hand, the difference between ASO and SPCC leads the researcher to suspect that some ASO reports may not be in the sample. Regardless of its completeness, the sample size is sufficiently large to fairly reflect Navy experience. Any omissions can be assumed to be random which further supports the validity of the sample.

In terms of time experience, 65 of the reports (41%) were FY 85 actions, 145 (50%) were FY 86 records, and 14 (9%) were preliminary FY 87 documents. Viewed from the lag time inherent in the GAO process, this seems to be broadly consistent with overall GAO experience.

b. Analysis by Protestors

The 159 Bid Protest Action Reports reflect protests filed with GAO by 130 separate enterprises. In 110 cases, the protest was the only one submitted by that firm; 20 firms accounted for the remaining 49 protest actions.

Of the 20 protestors involved in more than one protest, eight protested different solicitations or contracts. Five of these were to the same contracting agency while three made separate protests to two agencies.

The remaining 12 protestors complained about 16 solicitations. On nine occasions two protests were made; two situations involved three protests; in one instance four protests were lodged; and in one case five protests were filed.

Thus, the sample of Bid Protest Reports indicate a wide range in the number of enterprises involved. Nearly 85% of the firms make only a single protest to GAO. Another 10.8% have filed only twice. Only one firm protested three solicitations or contracts and none protested more than that.

In approximately 22.7% of sample solicitations that were protested firms used the protest system to force their point by submitting multiple protests. One interpretation of this is that one in five protestors relies strongly on the GAO award protest process to enforce their desires. The other four-fifths do not expend further resources on the GAO process.

c. Analysis by Issue Stated

The 159 Reports sampled were arranged by issue areas cited in the report. The issue area categories used by the researcher are the same ones used by GAO in its annual reports. Results are shown in Table 26. One problem in tabulating the results is information missing from some reports. These unknown issues were included in the "other

TABLE 26

ISSUE AREA CITED

<u>Issue Area</u>	<u>ASO</u>	<u>SPCC</u>	<u>Long Beach</u>	<u>Phila.</u>	<u>Wash.</u>	<u>Total</u>	<u>Percentage</u>
1. Improper Sole Source	1	7	1	2	2	13	8.2
2. Solicitation Defective	3	7	3	4	7	24	15.1
3. Protestor's Offer Improperly Rejected	1	8	1	2	5	17	10.7
4. Awardee's Offer Improperly Accepted	-	7	6	3	5	21	13.2
5. Improper Selection Methodology	2	3	4	10	8	27	17.0
6. Unjustifiably Found Nonresponsive	-	6	-	2	2	10	6.3
7. Awardee Not Responsive	-	2	-	-	-	2	1.3
8. Other Issues/No Issue	8	4	15	8	7	42	26.4

Source: Developed by Researcher from ASN reports

issue/no stated issue" category, so that category might be somewhat inflated to the detriment of another.

We can compare these results to the GAO results reported in Chapter IV to determine how the sample fared. The first and most important observation is that allegations of improper sole source award are over three times as high as the GAO averages. The bulk of these are at one activity, SPCC. Five of the seven protests to SPCC citing improper sole source awards were post-CICA FY 85 actions. SPCC reported none in FY 86 and only two by February 1987. Except for SPCC, the other activities were close to the GAO experience. So it is likely that the finding is an anomaly. Other activities are closer to the GAO norm. The remaining categories are close to the GAO averages with the exception that nearly three times as many protests cited selection methodology problems. This variance may be a consequence of reporting terminology and the scoring methodology of the researcher. Several issue descriptions could arguably have been placed in the "improper rejection of protestors offer" category, which is somewhat below the GAO average. Overall, the sample percentages and GAO percentages are reasonably well aligned, except for the sole source issue noted.

d. Analysis by Protest Outcome

Bid Protest Action Report outcomes were tabulated. Results are given in Table 27. Only 11.9% of the protests could be identified as successful from the

TABLE 27

PROTEST OUTCOMES

	<u>ASO</u>	<u>SPCC</u>	<u>Long Beach</u>	<u>Phila.</u>	<u>Wash.</u>	<u>Total</u>	<u>Percentage</u>
Withdrawals (action unknown)	3	7	10	5	6	31	19.4
Withdrawals corrective action	-	12	3	-	2	17	10.6
Dismissals	8	21	11	17	14	71	45.0
Denials	2	2	3	8	9	24	15.0
Sustained		1		1		2	1.3
Closed without Decision	2	2	1		1	6	3.8
Unknown		2	2		4	8	5.0

Source: Compiled by Researcher from ASN reports

protestors view; 1.3% were sustained decisions at GAO and 10.6% resulted in an action that caused the protest to be withdrawn. Results were unknown in another 5% of the cases, but even if all of the unknown outcomes were successful, the sample success rate is still below 17% which indicates that success before GAO is slightly lower than the GAO averages.

e. Other Sample Data Entries

The quality of the remaining sample report entries which concern cost incurred and contract delay varies widely and generally deteriorates so drastically that further analysis is inhibited.

C. CORRELATION WITH FIELD ACTIVITY CONTRACT DATA

With the assistance of NRCC Long Beach personnel, DD Form 350 listings of all contracting actions were obtained for NRCC Long Beach by fiscal years and by contract method. Using DD 350 data, one should be able to examine commodity area or other constituent information to determine if any patterns exist. Sadly, of the 43 post-CICA protests--which includes protests to the contracting officer and GAO protests--only 11 could be tracked to DD 350 transactions. The translation difficulty lies in correlation of solicitation numbers pertaining to the protests and eventual contract numbers. The two are not uniformly traceable and in some cases no contract resulted. It is the researcher's opinion that this obstacle could be overcome, but is beyond the scope of the present research.

Of the 11 identifiable transactions, no apparent patterns developed: several different contract methods and Federal Supply Codes were involved.

D. CONTRACTING AGENCY PERSONNEL INTERVIEWS

Interviews were conducted to sample contracting activity personnel attitudes and awareness with 19 individuals: five from each ICP and three from each NRCC. The methodology was discussed previously in Chapter II.E. The results of the interviews are summarized below.

1. Experience Level

The individuals interviewed were all warranted contracting officers. Average experience exceeded 13 years; the range of experience spanned a minimum of two years to an upper limit of 28 years. All but one were supervisors; about half were first level supervisors and half second-level managers.

This profile of highly experienced individuals resulted from the fact that those to be interviewed were usually identified by senior contracts managers who knew the minimum experience level the researcher desired; specifically, individuals whose experience predated CICA.

One interesting comment was repeated in several separate interviews: while a good number of people with high experience levels are available, the experience of those they supervise is very low. Individuals with intermediate level experience are in short supply.

2. Knowledge of Those Interviewed

Every interviewee except one had at least a working knowledge of bid protests, the GAO process, and the Competition in Contracting Act. They can be characterized as a well-schooled group of practitioners. When asked to discuss the protest process, most mentioned protests to the contracting officer and protests to GAO and GSBCA, while omitting the courts as a forum. About one in five was able to fully articulate the total award protest process system (as described in Chapter III) and the features of each forum without prompting. The majority expressed their knowledge indirectly by identifying and explaining issues or concerns rather than by clear, explicit statements. It is the opinion of the researcher that the shortcomings encountered do not indicate a lack of knowledge, but rather indicated varying abilities on the telephone when talking to an unknown interviewer.

Few outright errors were expressed, but most of the responders did not know specific details. For example, a high percentage were aware that an agency response deadline existed for GAO protests, and many correctly linked it to CICA changes, but very few stated the correct number of days. Most stated a range of days or picked a value while expressing some doubt.

While all of those questioned expressed familiarity with CICA, their answers to the question regarding how CICA

changed the protest process (Question #12) varied widely. A small percentage exhibited a textbook knowledge; the majority cited only the response deadline and automatic stay provisions of CICA in a more or less explicit fashion.

This knowledge pattern--general familiarity without extensive details--fits well with the general perception that bid protests are exceptional occurrences. All but one of those interviewed chose exceptional when asked to characterize protests as routine or exceptional. The holdout selected "somewhere in between." In clarifying his remarks, this interviewee gave a distinct impression that exceptional was being construed to mean seldom seen rather than rare. If bid protests are low percentage occurrences, it makes sense that contracting officers are not overly familiar with details such as the response deadline time.

3. Bid Protest Practices

Bid protest practices were fairly uniform. When faced with a disgruntled offeror or bidder, every one of the contracting officers stated that they first try to listen objectively to determine whether a Government mistake has been made and to fully inform the party of the details concerning his or her situation. Most felt that the majority of potential protests could be avoided by dealing fairly with the would-be protestor at this stage. Many stated that if a mistake is evident they are quick and forthright about correcting the matter. Although all would

answer questions about protest rights, few would volunteer the information because they believed that it might invite a frivolous protest in the current post-CICA environment. Several emphasized that they believe many potential protests are avoided when the offeror or bidder is made fully aware of the constraints the contracting officer is under. Several also mentioned that difficulties arise in a pre-award situation when dealing with disclosures that could prejudice the balance of the award.

When faced with a protest to the contracting officer, a large majority handle the matter at the contracting officer level but most use legal counsel as support. All rely on arms length, yet informal processes, such as review by a supervisor.

Protests to the GAO effectively disengage most contracting officers; the legal staffs at the field activity prepare the required report for submission to GAO: the contracting officer only answers questions and provides paperwork to the legal staff. None of those interviewed had a good grasp of the costs involved in terms of dollars or time for GAO protests and none had been involved personally in a GAO conference.

Generally little of substance is done differently from a procedural viewpoint in the post-CICA world.

4. Perceptions of Those Interviewed

Approximately two-thirds of those interviewed felt that the number of protests had increased as a result of CICA; the others split fairly evenly between beliefs of no change and decreasing numbers of complaints. Of those who believe the number of protests are increasing, about half expressly link the new-found ease of obtaining stay of award as the cause of the increase.

None of the interviewees considered a bid protest a black mark against his or her own performance or that of any of those they supervised. Some did volunteer that if a pattern of bid protests with valid causes emerges, they would look for negligence on the part of the contracting officer. Most expressed the belief that bid protests result from a variety of causes that are beyond the control of the contracting officer and therefore, protests are not an indicator of poor performance.

When questioned about how the prospect of a bid protest influences their pre-award behavior, nearly all initially stated that bid protests did not influence them, yet continued by explaining that they did "second guess" more frequently and also harbored some increased degree of concern--thus effectively qualifying their initial "no." When asked if the possibility of a bid protest intimidated them, only one interviewee said "yes"; most of the "no" responses were emphatic. A general trend appeared in the

discussions at this point: the respondents linked opinions that protests were facts of "contracting officer life," that protests are avoided when possible, and stated that the general defense was to redouble efforts to "do things right."

Two thoughtful answers include observations that contracting officers have probably modified their behavior to include a consideration of appearances before awarding. Prior to CICA awards were made on the basis of applying evaluation criteria without much second guessing. Now, contracting officers are likely to review the evaluation package after deciding the winner to assess how defensible the Government position is from the viewpoint of the unsuccessful offerors as well. A second observer noted that administrative lead time is increased in this manner in a very insidious fashion.

An added associated concern of several among the supervisors interviewed was a general perception that an inexperienced or untrained contracting work force is not sensitive to the matters that leave the Government most vulnerable to protests. Those supervising such staffs feel a strong need to be more concerned in review solicitations and control of the work force.

Three interviewees separately warned that urgent contracting situations are the ones that lead to less

supportable decisions and consequently to greater protest susceptibility.

Despite the subtle increase in the level of concern, none of those interviewed had established new procedures to cope with their concern. Only one activity had a published instruction or desk guide concerning handling protests, and it is severely out-of-date. Furthermore, no added reviews or checklists were being used to assuage susceptibility. Respondents from two activities stated that already existing review procedures were being given greater emphasis.

Approximately two-thirds of those interviewed stated that they believed CICA changes had not affected their behavior, notwithstanding their previously-stated ambivalence about the extent of pre-award concern afforded protest considerations. Many of these individuals stressed that CICA did not alter what could be protested, only how the protest would be processed. The remainder of those interviewed cited a need to adhere to a renewed disciplined, up-front effort to avoid such protest and the associated delays.

The most frequently cited consequence of CICA is an increased number of protests with a concomitant increase in frustration and work necessary to resolve the protest. Several observers stated that they felt CICA indirectly "tightened up" the entire protest process and that solicitations are reviewed before release more rigorously

than prior to CICA. Another observer stated that the requiring activities are the real losers, especially where the award of a service contract is delayed and no services are available while a protest is resolved. A few interviewees identified each of the following: more delayed contract awards, increased procurement lead time, and increased competition due to greater awareness of the possibility of a protest.

When asked whether the CICA bid protest system is fairer than its predecessor, about two-thirds responded affirmatively. They cited the more rigorous system, especially response times, plus the relative ease of protest as changes that favor contractors. The other third did not believe the pre-CICA methods were unfair and saw no difference. Nearly half of those who felt that CICA changes improved the system also made the distinction that the balance scales have swung too far in favor of the protestor. Their specific complaint is that frivolous protests can stop the Government procurement process. Most recommend further legislative change that would differentiate between valid and malicious protests before a stay is given.

5. Unintended Consequences

None of those interviewed specifically identified what they felt was an unintended consequence of CICA. It is however, the researchers opinion that two interviewee's observations are, in fact, unintended consequences. The

first is that solicitations may be receiving better quality control review before release in an effort to avoid protests. The second is that more attention is paid to the "appearances" of any tentative award in the final stages of evaluation. A related matter is the impression of one observer that unrecognized delays result from this longer evaluation process.

E. SUMMARY

The purposes for examining field activity level experience in the post-CICA environment were two-fold: first, to determine how things have changed as a result of CICA provisions; and second, to see if any unintended consequences are apparent. The subsidiary research questions pertaining to what is the new process and how has it changed; the extent of exercise of new stay and termination provisions; behavior of the principals; and unintended consequences can all be partially answered as a result of these investigations.

The results of the interviews indicate that the actual process at the field activity level did not change in terms of contracting officer protests and did not change significantly in terms of GAO protests. For all intents and purposes, the contracting officers are not actors in the GAO drama; rather they turn their files over to staff lawyers who handle matters. The impact of CICA is that the response time from the agencies is directed. The lawyers are the

ones involved in meeting the deadline, although the contracting types are consulted to clarify the files. Stated increases in protests were rarely supported in personnel experience.

Very few of those interviewed had experienced many post-CICA GAO protests so they were not in a position to comment on the number of stays and terminations or the frequency of such.

The principal change in the behavior of contracting officers at field activities is an increased sense of being constrained by the system. Bid protests are not seen as consequences of mistaken actions that the contracting officers have taken. Rather, they perceive that bid protests not only can result but likely will result from a variety of reasons that are independent from the contracting officers practices. While the delays and extra, unproductive workload are to be avoided, the contracting officer is not responsible if a protest results. The only loser is the requiring activity which may have to do without until the matter is resolved.

Although there is a widespread awareness of the so-called 22-cent protest most have not actually personally experienced the situation.

In general, the field activities chosen seem to be in the mainstream of Navy experience, and NAVSUP collectively is a good representative of overall Navy experience. Navy

experience in terms of protestors and issues protested agree reasonably well with average GAO data.

The level of detailed data available at the field activities is minimal. While one immediate response is to criticize the lack, it is probably the appropriate amount of data for events that occur in a small percentage of instances and which require a tailored reaction when they do occur. It is not a good decision to attempt to manage special events by dedicating scarce resources to establishing and maintaining seldom used statistics.

Finally, two unintended consequences have been identified, but their factual existence may be hard to establish: first, contracts are being reviewed somewhat more intensively to eliminate protestable matters and second, the source selection process may have gained an additional end of selection review step taken to assess the defensibility of the award as proposed at a cost of increased lead time.

VI. SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

A. RESTATEMENT OF OBJECTIVES

This research focuses on the CICA-directed bid protest reform from the perspective of whether the legislation met its intended purposes. Whether CICA corrected any of the documented problems with the award process system can also be assessed by examining the nature of the award protest process and comparing how it functions before and after the legislation. The effectiveness of the award protest aspects of the Competition in Contracting Act can be judged in terms of the analysis.

The identification of unforeseen consequences that have resulted from the statutory changes is an important part of the study. Unintended consequences can be the basis for further analysis and recommendations.

Lessons learned that are of practical interest to contracting officers and contractors were also sought. Another practical aspect is that the study can contribute to a more extensive literature database.

B. MAJOR CONCLUSIONS

1. Increased Number of Protests

Based on analyses using a variety of forecasting techniques, the number of initial and total protests appear to have increased marginally by 10-15% over the levels that

would have been expected otherwise. The number of protests received at GAO--both initial and total protests--increased dramatically in FY 85, both before and after CICA, while FY 86 numbers were less than FY 85 but greater than FY 84. Much of the FY 85 spike appears to be an anomaly which may be related to the concurrent effects of CICA and introduction of the FAR. Furthermore, the percentage of reconsideration requests has doubled.

An increase in protests cannot be considered surprising in the face of Congressional intentions to enhance greater usage of the GAO process. However, by directing GAO to advertise its bid protest process anew and offering automatic stays and terminations, Congress may have indirectly invited additional protests by implying to would-be protestors that some new, more lenient basis for protests had been enacted. In fact, the changes enacted in CICA do not substantively alter what may be protested--only the procedures by which the protests are processed. This line of reasoning is consistent with an increase in requests for reconsideration. Also, field activity personnel have encountered a greater number of protests regarding matters that exceed the previous norms for protest. Therefore, while the increases in numbers of new protests are not surprising, the cause of the increase is different from what Congress might have expected.

2. Protest Issues Unchanged

The reasons stated in GAO award protests have not changed in a definite manner as a result of CICA. There is no evidence among the award protests filed with the Comptroller General that the percentage of complaints alleging improper sole source award has increased. In fact, this issue is given only in approximately 2.5% of protests, a statistic unchanged with CICA.

The primary, stated purpose of CICA award protest reform was to enforce additional competition in Federal contracting by allowing those excluded from sole source contracts to file protests. The unchanged behavior of protestors indicates that this intent of CICA has not been successful. However, contracting agency actions may have neutralized the provision. General agency response to CICA has been a major shift to competition along with a dramatic reduction in sole source contracting. It is impossible to determine what effect the threat of a protest may have had on the agency decisions to compete such contracts rather than risk protest of a sole source award. To the extent that contracting agencies vacated abuse of sole source contracting, the reasons for protesting sole source awards have diminished.

3. Protest Fairness Results Mixed

The other reasons for altering the bid protest process were to correct a longstanding omission of

authorization to GAO and to make the process more equitable by gaining speedy decisions and providing effective remedies. By dictating a firm response time to contracting agencies and by providing GAO the authority to dismiss protests lacking merit, the overall caseload has been handled in a much more effective fashion. Overall case disposition time has decreased by a factor of three, and developed cases are resolved in half the time needed prior to CICA. Obviously, this reduced time affords a much fairer treatment of a valid protest. The majority of post-CICA cases are also being resolved before contract award, which corrects the pre-CICA problem of reduced remedies. However, the change has been at the cost of unmeasured contract delays and requiring activity inconvenience that results from the stays and terminations encountered. The same stay and termination features that provide the desirable result also permit an arbitrary, or frivolous protest to bring Government procurement to a halt. It is difficult to determine the average procurement time incurred for such protests, as they are not specifically identifiable.

4. Protest Outcomes Unaltered

Protest outcomes have not changed significantly in consequence of CICA, although there may be a slight increase in the number of cases heard on the merits. On average, 25% of initial protests filed will be resolved by withdrawal. About half the withdrawals are due to agency corrective

action. Another 50% are resolved without decision on the merits of the protest--most will be dismissed by either a notice decision or a summary decision. The remaining 25% are decided on the merits, but only a small minority will be decided for the protestor. On average, only 7-8% of protests filed will be sustained. There is no evidence that CICA has affected this percentage. Combining the cases withdrawn due to agency corrective actions and cases sustained gives a net protestor effectiveness percentage in the 20% range, i.e., approximately one protest in five will satisfy the protestor. GAO uses a measure called protestor effectiveness rate to measure the same protestor success, but the GAO estimate is slightly higher and it cannot be derived from the data they report routinely.

5. Length of Time for Legislation to Be Enacted

One interesting conclusion is that it takes a very long period for rather esoteric changes such as the bid protest recommendations contained in the COGP Report to gain a consensus support enabling approval as law. Almost 12 years elapsed between COGP recommendations and the CICA. Sadly, the recommendations of COGP were implemented in a piecemeal fashion which may have compromised the results.

6. Award Protest System Fragmentation

The award protest system described herein is fragmented, overlapping in areas, and ill-defined in many others. Procedures for protest to the contracting officer

vary widely among agencies without reason. The two administrative forums--contracting officer and GAO--are not coordinated. Protestors can use both forums and nuances exist that make the system confusing, such as the 10 day time allowed to file a protest to GAO runs regardless of whether a protest has been filed with the agency. The discontinuities make the system confusing and cumbersome.

7. Contracting Officer Knowledge of the Protest Process

During the course of interviews to determine contracting officer attitudes toward and awareness of CICA at field activities, it was strongly evident that the overwhelming majority of contracting officers interviewed had a superior general knowledge of the bid protest forums and the issues involved with the CICA changes. Working knowledge of details was not quite so complete, but it was consistent with normal contracting officer involvement and can be considered more than adequate to accomplish the contracting agency role.

8. Contracting Officer Behavior Unchanged

In general terms, contracting officer behavior has not changed observably in direct response to CICA. Any changes that have occurred are subtle. Business is conducted as it was before. Protests remain exceptional matters that occur in a small number of contract situations for reasons that may or may not be a result of the contracting officer's activity. While these field activity

personnel have a healthy attitude regarding considering the complaint, correcting agency errors when found, and avoiding protests when possible, they are not intimidated by the new GAO process and have not established new or modified existing explicit contracting procedures in response to the legislation.

9. Use of New Stay and Termination Provisions

Exact use of the new stay and termination provisions of CICA is difficult to determine, however it has been a factor in at least the 8% of cases previously received before and decided after award that are now decided before award. Stay and termination provisions also affect cases received and decided before award, but the extent of the effect is not presently known.

10. Award Protest Management

Generally, there are no management control standards for the award protest process. GAO statistics reporting award protests are either workload measures that justify the size of the GAO legal staff or a measures of how the contracting agency compare with one another. The only performance measures involved are disposition times that are monitored to assure statutory compliance.

Within DOD, comparable statistics are apparently poorly kept at best. Since no one presently manages DOD statistics, it is safe to assume that no one in DOD truly manages award protests for such matters as trend

identification or process control. Because the field activities treat protests in a reflexive manner, they do not even bother to accumulate the statistics they report to higher agencies and the higher agencies do not apparently use the reported information.

11. Unforeseen Consequences

Two unintended results of the legislation have been identified in this research. First, the contracting activities may be dedicating increased attention to solicitations to assure that they are less subject to protests. If this were limited only to assuring the quality of the solicitation, it would be an unqualified beneficial result. However, in an environment where contracting officers believe that protestors have license to protest at will, without justifiable basis, it is likely that some of the scrutiny is being wasted on matters of appearances rather than substance and that some waste of resources is occurring. Second, contracting officers may be spending unwarranted efforts on reviewing the appearances of their decision methods after the fact. This is also a waste of resources and an unnecessary lengthening of the leadtime for procurement.

C. RECOMMENDATIONS

1. Amend CICA

The problem described herein relating to the shift of the burden of proof from the protestor to the Government

which resulted from the CICA language has been identified and criticized by many, including staff personnel working with the appropriate Congressional Committees. The matter can be easily resolved by amending the CICA language to empower GAO to authorize stay of award rather than making it automatic. GAO can readily determine whether such a stay is advisable and stays resulting from protests lacking merit on their face can be avoided.

2. Integrate the Administrative Forums

Congress should direct OFPP to recommend changes to the present award protest system that would standardize the procedure for protests to the contracting officer among the agencies and would integrate the contracting officer and GAO protest forums to eliminate overlap and inconsistencies. For example, if OFPP required that protests be filed first with the agencies, all of the withdrawals that occur due to corrective agency action would be eliminated. Similarly, the costs incurred by contractors for double filing to both agency and GAO could be avoided.

3. Modify GAO Data Reporting

GAO should modify its report data to differentiate between protests of competitive proposal method contracts to distinguish between contracts awarded where competition exists from these awarded under other than full and open competition. This added information would assist in dispelling the errant notion that bid protests are a

competition enforcement means and might provide insight into the reasons protests are filed that could be used to avoid protests.

4. Agency Reports to ASN Should Be Used

Given that the data requirement already exists and is being met to a greater or lesser degree by the field activities, the data should be accumulated and put to use. If ASN reported back the summary data of all reporting activities, activities could compare their experience to experience of similar organizations. Field activities could then track their own performance to assay trends and senior contracting managers could use such summary data to determine overall contracting performance, to identify problems or trends and to initiate corrective actions.

5. Field Activities Should Manage Award Protest Activity

Field activities presently report data to higher level organizations. They should accumulate and use the data that they presently export to manage their award protest activity. The logical group within each organization to perform this summarization task is the legal staff, who presently accomplish the balance of the GAO procedure anyway. However, senior contracting managers should be monitoring their levels of protests, protest issues, and overall success to determine how protests might be more effectively avoided in the future.

D. ANSWERS TO RESEARCH QUESTIONS

The subsidiary research questions will be answered first in an attempt to build on the answers to address the primary question.

What causes precipitated the changes found in the CICA?

The changes to the GAO bid protest process contained in CICA resulted as a byproduct of efforts to restore competition to Federal contracting after a long period of decline during which directed procurements had been the staple of contracting. GAO was given authority to hear protests, new disposition deadline were established for both agencies and GAO, and automatic stay and termination provisions were included almost as an afterthought.

The basis for reform of the award protest system had been on the agenda since the 1972 COGP Report. The award protest system investigated in the 1970 time frame by COGP consisted of three processes: contracting agency, GAO and judicial. The three processes originated separately and were so poorly integrated that the Study Group members considered the system "unfair and ineffective." Three major problems were cited: absence of procedures and remedies that assure fairness; delays in processing protests; and lack of a plan to reduce the number of protests. COGP cited an underlying lack of a comprehensive, coordinated, and integrated scheme that would unify the overall system in a

manner that would assure fair and equitable treatment for all protestors.

What were the primary objectives regarding the bid protest process that can be found in the CICA and have they been achieved?

The objectives of the CICA changes match the causes summarized above. First, CICA was intended to provide an enforcement tool to Government contractors to force agencies to comply with the competition dictates of the legislation. Second, the legislation served as a vehicle to clean off the old agenda of protest reform that survived from COGP recommendations.

What is the new bid protest process and to what extent did it actually change from pre-CICA procedures?

The post-CICA bid protest process has nearly the same procedures as its pre-CICA predecessor. The only significant changes are the deadlines established for agency and GAO actions, the new right to dismiss unworthy protests at an earlier stage, and some of the remedies available to GAO, specifically the right to award bid proposal costs and attorney fees.

The changes have been compliance with the directed times; overall average case disposition times have been cut by two-thirds and developed case disposition time is cut in half. GAO has used the dismissal power with a vengeance which is reflected in the total disposition time. The

average number of cases decided before award had increased and presumably the range of remedies available to GAO has been broadened thereby increasing process fairness.

One fundamental change that may or may not have been fully understood by the legislators is the shift of burden of proof from the protestor to the Government which results from the automatic stay and termination provisions of the legislation. This has resulted in delays that are not readily calculable.

What are the principal management control standards of the bid protest process and what changes do these measures reflect?

GAO reports a wide range of statistics that measure the GAO protest process, but it is incorrect to consider them management control standards. More realistically, the number of protests arise from overall Government contract activity and practices and GAO responds. This is the same at the field activities surveyed. None of the activities manages the protest process; few even bother to accumulate data on the amount of resources they expend dealing with protests.

The GAO statistics do provide sufficient information to assess that the level of total and initial protests increased by 10-15% at the time of CICA, case disposition times fell dramatically, and case decision ratios remained

largely unchanged. These data are the evidence of the impact of CICA.

To what extent have the new stay and termination provisions been exercised?

The increase in the percentage of cases resolved before award is approximately 8%. All of these cases are affected by the stay provision. Additionally, some percentage of the cases received and decided before award are affected differently than prior to CICA, yet it is difficult to assess how many and how significant the influence has been. This question remains largely unanswered.

Has the behavior of the principal entities involved in the process changed as a consequence of CICA?

During the course of the personnel survey, it was established that contracting officer behavior has not been affected in an obvious externally observable factor. However, a level of frustration and disassociation is apparent and a few of those interviewed identified rather subtle ways in which contracting officer behavior may have changed. Specifically, the contracting officers may be taken greater measures to avoid bid protest and the concomitant delays inherent in the GAO forum by avoiding situations they believe are susceptible to protest. To the extent that these activities are nonproductive, they are an undesirable, and unforeseen outcome of the legislation.

Have there been any unintended consequences of the CICA bid protest modifications?

Two possible unintended consequences were identified: first, added review measures to delete protestable matters from solicitations and added post-evaluation review to assure award criteria were defensible after application. The actual causal relationship of these unintended consequences of CICA would be very difficult to prove in a clear fashion.

Primary Research Question: What has been the impact of the Competition in Contracting Act of 1984 on the bid protest process?

The primary intent of CICA to serve as an enforcement mechanism to assure greater competitive procurement has not been exercised. If the measure had any effect, it was in the form of a threat that the agencies chose to avoid.

As a reformation of the award protest process, the CICA changes have only been partially effective. The GAO forum is undoubtedly faster and a greater number of protests are being resolved before award, so more equitable treatment can be assumed. However, the change has been at the cost of unmeasured contract delays and requiring activity inconvenience that results from the stays and terminations encountered. Overall, the total system which consists of three forums remains fragmented, confusing, and less than efficient.

E. SUGGESTIONS FOR FURTHER RESEARCH

The term "interested party" is used by GAO as a word of art and it is defined in CICA. However, GAO has interpreted the phrase in various ways in its case decisions to include or exclude stockholders, subcontractors, outside parties, and others. It would be of interest to compile the various GAO case decisions interpretations to achieve a clearer description. Such a clear description could be published to provide contractors with a better understanding of when they have standing to file.

The GAO routinely refuses to hear issues that relate to Small Business size and status and matters under Department of Labor cognizance. The fact that protests continue to be sent to GAO indicates a problem exists. This area could be investigated further.

Finally, the Bid Protest Action Report files at ASN could be examined in greater detail to determine if the data reported in the entire file is consistent with the results of the survey analyzed in this research.

F. SUMMARY

The Competition in Contracting Act of 1984 has resulted in rather dramatic changes in Federal procurement on the large scale; but it has had less impact in terms of correcting award protest problems. In fact, the remedy has gained improvement in terms of faster disposition and fairer remedies at the expense of increased contract delays. In

some indeterminate number of cases, the delays are incurred without a good reason which serves to increase the level of frustration of the contracting officers and the requiring activities. Further amendments to the law are needed to rectify this problem. Additionally, there may be rather subtle consequences of the legislation that are counterproductive.

APPENDIX

INTERVIEW QUESTIONS

TELEPHONE INTERVIEW CHECKLIST

NAME _____ DATE _____
PHONE NO. _____ TIME _____
ORGANIZATION _____
POSITION _____
COMMODITY _____

Introduction: This is a telephone interview regarding the bid protest process and contracting officer attitudes towards it. May I ask you a few questions?

1. What is your experience in contracting?
[Does contracting experience predate CICA, i.e., January 1985?]
2. Would you describe the bid protest process to me?
Key points addressed: Protest to KO _____
Protest to GAO/GSBCA? _____
Protest to Courts _____
3. Do you describe this process to contractors in the course of routine practice? If so, when?
4. Have you personally experienced a bid protest?
If so, was the protest successful?
5. Are bid protests increasing or decreasing in frequency at your organization?
6. What do you do when a dissatisfied contractor calls to complain either before or after award?
Do you advise him of his rights to protest?
Do you assure them that the transaction was fair?
Do you seek legal help?
7. What do you do when notified of a bid protest?
Do written procedures exist? If so when were they written and implemented?
8. Who handles KO protests, you or your supervisor?
Are bid protests considered a routine or exceptional situation?
Are bid protests considered a black mark against your performance?

9. Who handles GAO bid protests?
You or supervisor? _____
Routine or exceptional? _____
Black mark?
How long does it take your organization to respond to the GAO?
Do you have any feel for hours or cost involved in preparing a response?
Does your organization participate in GAO conferences with the protestor?
10. Does the prospect of a bid protest influence your pre-award behavior? If so, how? Intimidation? Degree of concern? Indifference?
11. Do you take any special measures in setting up your contracts to avoid potential bid protests? Legal review? Special checklists? If so, when did you start these procedures?
12. Are you familiar with the Competition in Contracting Act of 1984? Do you know how it changed the bid protest process?
Checkpoints: GAO authority
Response time
Automatic stays
13. Has CICA affected your behavior to bid protests?
14. What do you see as the consequences of CICA?
Checkpoints: Increased/decreased no of protests
Better K QA before release
Increased PALT
Additional paperwork
Added reviews in legal
Other
15. Do you believe that CICA changes made the bid protest system more fair than it was?

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